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# Rethinking Victim-Based Statutory Sentencing Enhancements

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RETHINKING VICTIM-BASED STATUTORY SENTENCING  
ENHANCEMENTS

KEVIN BENNARDO\*

ABSTRACT

*Punishment enhancements that are triggered by some trait of the victim are deeply entrenched in American criminal statutes. The research underlying this Article identified over 120 distinct traits that a victim could possess that would statutorily enhance the offender’s punishment. These enhancements are often based on an inherent trait of the victim (e.g., age, disability), the victim’s occupation (e.g., law enforcement officers, utility workers), or a non-occupational role-based undertaking (e.g., jurors, visitors at a detention center).*

*This Article argues that such victim-based statutory enhancements should be eliminated. First, they are dreadfully inegalitarian. These enhancements send the message that society prefers the victimization of individuals who do not happen to possess any of the protected characteristics. These enhancements create classes of “preferred victims” within society. Rational offenders are therefore incentivized to select victims who possess none of the triggering traits. In other words, such enhancements send the message that society wishes to protect some individuals more than others.*

*Second, the Article identifies the four goals that these enhancements are meant to serve: (1) deterring the victimization of vulnerable individuals, (2) increasing punishment to account for the greater harm that results from victimizing certain individuals, (3) incentivizing individuals to undertake certain occupations, and (4) honoring certain types of individuals. The latter two goals are simply not legitimate uses of the criminal law because they are unrelated to any of the theoretical purposes of punishment. The first two goals, while legitimate uses of the criminal law, are not well served by the existing legislation. The victim-based traits that trigger the enhancements are poor proxies for these legislative goals. For example, an enhancement triggered by victimizing a person over the age of sixty-five is both over- and under-inclusive to achieve the goal of deterring the victimization of vulnerable individuals because age is not necessarily correlated with vulnerability. Thus, these victim-based statutory sentencing enhancements should be repealed and replaced with legislation that better accomplishes the legitimate underlying goals.*

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## I. INTRODUCTION

Many criminal statutes enhance the offender's punishment based on certain attributes of the victim. These enhancements send an inegalitarian message: Society prefers the victimization of some individuals rather than others. They create a class of "preferred victims." Indeed, a rational offender's response to these statutory punishment enhancements would be to victim-shop for an individual who possesses none of the specially protected characteristics.

In Part II, this Article opens with an overview of specially protected characteristics of victims that give rise to statutory sentencing enhancements. Although many different offenses contain victim-specific enhancements, the primary research for this Article analyzed assault and battery statutes in the United States. Over 120 distinct traits were identified that, if possessed by the victim, trigger statutory punishment enhancements. An Appendix organized by jurisdiction lists the characteristics that, if possessed by the victim, trigger enhanced punishment.

In Part III, this Article identifies the four purposes that these enhancements are meant to serve: (1) deterring the victimization of vulnerable individuals, (2) increasing punishment to account for the greater harm that results from victimizing certain individuals, (3) incentivizing individuals to undertake certain occupations, and (4) honoring certain individuals. The first two purposes are legitimate uses of the criminal law and punishment enhancements; the latter two purposes are not. Thus, all enhancements based on the latter two purposes should be repealed. The problem with the current enhancements based on the first two purposes is that the victim characteristics that trigger the enhancements are poor proxies for the underlying purposes of the enhancements. Thus, these enhancements should be rewritten so that enhanced punishment is triggered by an offender who actually violates the underlying policy of the enhancement rather than by an imperfect proxy based on the age or occupation of the victim.

Part IV discusses the societal harm that is inflicted by creating classes of victims based on physical and occupational traits. Different punishments should not be doled out depending on whether the victim is the Governor, the coach of a college sports team, or an 'ordinary' person.<sup>1</sup> These categorizations do not square with society's aspirations for equality. Instead of dividing victims based on their traits, legislatures

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1. In Pennsylvania, knowingly causing bodily injury to the Governor in the performance of his duty is a first-degree felony. 18 PA. CONS. STAT. § 2702(a)(2), (b), (c)(28) (2016). Doing the same to a college coach during a sports event is a first-degree misdemeanor. *Id.* § 2712(b). Doing the same to an 'ordinary' person is a second-degree misdemeanor. *Id.* § 2701(b).

should enact sentencing enhancements (if at all) on the basis of generally applicable categories that are more closely tied to the underlying purposes of punishment, such as vulnerability or the infliction of greater harm.

## II. The Statutory Landscape

Statutory sentencing enhancements based on traits of the victim come in all shapes and sizes. The following subparts provide the lay of the land in terms of types of characteristics that trigger such enhancements, the role of scienter in triggering these enhancements, and the types of enhancements available.

### A. *Specially Protected Victims*

For the purposes of this Article, ‘specially protected victims’ (or ‘special victims’ for short) are classes of individuals that are treated differently than ‘ordinary victims’ in the criminalization or punishment of offense conduct. The class may be as small as a single person—the President, for example<sup>2</sup>—or as broad as a group that comprises the majority of the population—all females, for example.<sup>3</sup>

The ‘special’ characteristic of the victim may be an inherent trait (e.g., age<sup>4</sup> or disability<sup>5</sup>), an occupation (e.g., a sanitation worker<sup>6</sup> or a prosecutor<sup>7</sup>), or some other role-based characteristic (e.g., a witness in an official proceeding<sup>8</sup> or a visitor at a detention center<sup>9</sup>). The special characteristic may be a blend of inherent and role-based or occupational traits, as in the case of a disabled veteran.<sup>10</sup> Certain animals

2. *See, e.g.*, 18 U.S.C. § 871 (2012) (threats against the President); *id.* § 1751 (kidnaping, assaulting, or assassinating the President).

3. *See, e.g.*, N.C. GEN. STAT. § 14-33(c)(2) (2016) (assault or battery on a female by a male); V.I. CODE ANN. tit. 14, § 13-298(5) (2016) (assault).

4. *See, e.g.*, ARK. CODE ANN. § 5-13-202(a)(4)(C) (2016) (battery victim age sixty or older or twelve or younger); DEL. CODE ANN. tit. 11, § 612(a)(6), (11) (2016) (assault victim age sixty-two or older or younger than six).

5. *See, e.g.*, MASS. GEN. LAWS ch. 265, § 13F (2016) (assault and battery or indecent assault and battery on person with intellectual disability); 11 R.I. GEN. LAWS § 11-5-11(b) (2016) (assault on person with disability due to mental or physical impairment).

6. N.Y. PENAL LAW § 120.05(3) (McKinney 2016) (assault).

7. *See, e.g.*, MISS. CODE ANN. § 97-3-7(1)(b), (14) (2016) (assault); OHIO REV. CODE ANN. § 2903.13(C)(9) (West 2015-2016) (assault).

8. *See, e.g.*, CONN. GEN. STAT. § 53a-59(b) (2016) (assault); WIS. STAT. § 940.201 (2015-2016) (battery or threat to witness, family member of a witness, or person sharing domicile with a witness).

9. *See, e.g.*, FLA. STAT. § 784.082 (2016) (assault or battery on visitor in a detention facility by a detainee); IDAHO CODE § 18-915B (2016) (propelling bodily fluid or waste at certain persons by a detainee or prisoner).

10. LA. STAT. ANN. § 14:34.1(B)(2), (C) (2016) (battery).

even garner special protection.<sup>11</sup> For occupational traits, the special protection often extends only to an individual acting in the course of her occupation.<sup>12</sup>

The primary research for this Article compiled every type of special victim specially carved out in assault or battery statutes in fifty-four domestic jurisdictions.<sup>13</sup> The offenses of assault and battery were selected because every jurisdiction criminalizes one or both, the offenses are easy to locate within each jurisdiction's code, and the quantity and variety of specially protected victims are robust.<sup>14</sup> Generally, only special victim characteristics particularly described in the assault and battery statutes were considered. Victim characteristics identified in general provisions setting forth aggravating circumstances to be considered in the sentencing of all offenses were excluded (e.g., 'vulnerable victims' as a generally applicable aggravating sentencing factor).<sup>15</sup>

In order to isolate enhancements that were solely the product of a characteristic of the individual victim, several types of enhancements were excluded. Most notably, jurisdictionally relevant victims and relationship-based victims will not be discussed in depth. Federal assault and battery statutes contain numerous special characteristics of the victim as elements, but these characteristics are often (or perhaps always) at least partially jurisdictional.<sup>16</sup> The victim's special characteristic (e.g., an employee of the federal government) is what gives rise

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11. See 18 U.S.C. § 1368 (2012) (harming "dog or horse employed by a Federal agency" for law enforcement purposes); N.D. CENT. CODE § 12.1-17-09 (2016) (killing or injuring law enforcement support animal); OKLA. STAT. tit. 21, §§ 649.1, 649.2, 649.3 (2016) (killing or mistreating police dog, police horse, or service animal that is used for benefit of a handicapped person).

12. See, e.g., OR. REV. STAT. § 163.165(1)(i) (2015) (assault on operator of a taxi while in control of the taxi); S.D. CODIFIED LAWS § 22-18-1.05 (2016) (assault on public officer while engaged in the performance of an official duty).

13. The fifty states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

14. Of the fifty-four jurisdictions, only Puerto Rico does not identify any special victims directly in its assault and battery statutes. P.R. LAWS ANN. tit. 33, §§ 4749-4753 (2016).

15. For example, in Puerto Rico, the vulnerability of the victim is identified as a general aggravating circumstance to be considered in the sentencing of all offenses. *Id.* § 4700(n) (identifying minors, elderly persons, persons with a physical or mental disability, and pregnant persons); see also *id.* § 4702(b) ("When one or several aggravating circumstances concur, a punishment for a term within the upper half of the range of punishments set forth in this Code shall be selected for the crime.").

16. See, e.g., 18 U.S.C. § 111 (assault on governmental employee); *id.* § 112(a) (assault on foreign official, official guest, or internationally protected person); *id.* § 351(e) (assault on member of Congress or Cabinet or U.S. Supreme Court justice); *id.* § 1389 (assault on serviceman on account of military service); *id.* § 1501 (federal process server); *id.* § 1751(e) (assault on President or Vice-President); *id.* § 2231 (assault on person executing federal warrant). It is possible to determine whether the victim's 'special' status carries any significance by comparing the penalty for victimizing a 'special victim' to the penalty for victimizing an 'ordinary victim' within the territorial jurisdiction of the federal government. Compare, for

to federal jurisdiction over the offense. Thus, this Article largely leaves federal offenses untouched because of the jurisdictional component of these victim characteristics.<sup>17</sup>

Enhancements that arise from the relationship between the offender and the victim are also beyond the scope of this Article. The largest set of such offenses is domestic violence offenses.<sup>18</sup> Other subsets include abuse offenses against those charged with the care of the victim (e.g., abuse of children or dependent adults by caregivers,<sup>19</sup> of patients by health care professionals,<sup>20</sup> or of inmates by correctional staff<sup>21</sup>). These enhancements arise from the violation of a duty or responsibility of the offender with regard to the victim or the exploitation of a position of power. Thus, these enhancements are fundamentally different than those arising simply on the basis of a characteristic of the victim.

Also, the coverage of this Article is limited to special victims between the time of birth and the time of death. Thus, statutes directed at the

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instance, the penalty for any of the immediately above-cited offenses with the penalty for assault of anyone within the maritime and territorial jurisdiction of the United States. *See id.* § 113.

17. Notably, in the federal system, the punishment ranges applicable to victimization of specially protected victims are sometimes identical to those applicable to the victimization of an ‘ordinary’ victim within the territorial jurisdiction of the federal courts. This perfect overlap discloses that the victims are only ‘special’ in the jurisdictional sense. *See, e.g.*, 18 U.S.C. § 1116(a) (adopting the punishments for homicides occurring within the special maritime or territorial jurisdiction of the United States as the punishments for homicide offenses against foreign officials, official guests, and internationally protected persons).

18. *See, e.g.*, ALA. CODE § 13A-6-130 (2016) (defining domestic violence where “the victim is a current or former spouse, parent, child, any person with whom the defendant has a child in common, a present or former household member, or a person who has or had a dating [or engagement] relationship . . . with the defendant”); CAL. PENAL CODE § 243(e)(1) (West 2016) (defining battery against “a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant’s child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship”); WYO. STAT. ANN. § 6-2-509 (2016) (strangulation of a household member).

19. *See, e.g.*, GA. CODE ANN. § 16-5-101(a) (2016) (neglect of a disabled adult, elder person, or resident by guardian or person having immediate charge, control, or custody); GA. CODE ANN. § 16-5-70(a) (2016) (cruelty to children by parent or guardian); MINN. STAT. § 609.2325 (2016) (criminal abuse of vulnerable adult by caregiver); VT. STAT. ANN. tit. 13, § 1304 (2016) (cruelty to child by person over the age of sixteen having custody, charge, or care of the child); WYO. STAT. ANN. § 6-2-503(b) (2016) (child abuse by a person responsible for the child’s welfare).

20. *See, e.g.*, MINN. STAT. § 609.231 (1984) (mistreatment of patient by employee of the facility); WIS. STAT. § 940.295(3) (2015-2016) (abuse or neglect of patient by employee of the facility).

21. *See, e.g.*, KAN. STAT. ANN. § 21-5416(a) (2011) (mistreatment of confined persons “by any law enforcement officer or by any person in charge of or employed by the owner or operator of [the] correctional institution”); MONT. CODE ANN. § 45-5-204 (2015) (mistreating prisoners by one “responsible for the care or custody of a prisoner”); WIS. STAT. § 940.29 (2015-2016) (abuse of resident of penal facility by employee of facility).

victimization of the unborn<sup>22</sup> or of corpses<sup>23</sup> are left out of the discussion. Note, however, that pregnant persons fall within the scope of the Article, although part of the rationale for enhancing the punishment for victimizing such persons may include protection of the unborn.<sup>24</sup>

With those caveats in play, the research for this Article uncovered more than 120 different classes of ‘special victims’ set forth in state assault and battery statutes.<sup>25</sup> Not surprisingly, the most popular characteristic of a victim to trigger a sentencing enhancement is the victim’s occupation as a law enforcement officer. A close second is victimization of a correctional officer. The other special classes found in a majority of the surveyed jurisdictions are emergency medical personnel, firefighters, school teachers or employees, and children below a certain age. Other popular classes of special victims (although not protected in a majority of jurisdictions) include health care workers, individuals above a certain age, pregnant individuals, transit drivers, probation employees or parole officers, disabled individuals, sports officials, and judges. Several jurisdictions offer blanket enhancements applicable to the victimization of all state and municipal employees.<sup>26</sup> Those jurisdictions were not counted in the individual tally for occupations like firefighter or transit driver even if the occupation would fall within the umbrella protection for all governmental employees (unless the occupation is otherwise specially protected).<sup>27</sup>

### *B. Scienter Requirements (and Lack Thereof)*

Must the offender know that the victim possessed the relevant trait to trigger the enhancement? The answer, unsurprisingly, is “it depends.” Many statutes that enhance the punishment for victimizing a specific type of victim require that the offender knew or should have

22. See, e.g., ALASKA STAT. §§ 11.41.280, 11.41.282 (2006) (assault of an unborn child in first or second degree); NEB. REV. STAT. §§ 28-397, 28-398, 28-399 (2016) (assault of unborn child in first, second, or third degree).

23. See, e.g., IOWA CODE § 708.14 (2017) (abuse of a corpse); TEX. PENAL CODE ANN. § 42.08 (West 2016) (abuse of a corpse or cremated remains).

24. See *infra* Section III.B.4.

25. See *infra* Appendix. For ease of reference, this Article refers to ‘state’ statutes even though the statutes surveyed also include the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

26. See, e.g., 720 ILL. COMP. STAT. 5/12-2(b)(7) (2016) (employees of the state and municipal and political subdivisions); MASS. GEN. LAWS ch. 265, § 13D (2015) (assault and battery upon public employees); W. VA. CODE § 62-2-10b(a)(1) (2016) (defining “government representative” to include all officers and employees of the state or political subdivisions thereof and persons under contract with the state or political subdivisions thereof).

27. For example, the Illinois aggravated assault statute specifies numerous individuals who would fall within the general class of state and municipal employees. See 720 ILL. COMP. STAT. 5/12-2(b) (2016) (e.g., park district employees, peace officers, firemen, correctional officers, transit employees).

known of the special trait of the victim.<sup>28</sup> Other statutes go further and require that the offender's illegal conduct be *motivated* by the special characteristic of the victim.<sup>29</sup> Many statutes, however, do not explicitly provide a separate knowledge requirement regarding the victim's special status.<sup>30</sup> In these cases, courts will sometimes interpret the statute to require knowledge of the victim's special status.<sup>31</sup> In other cases, courts do not.<sup>32</sup>

Far and away, the largest amount of judicial interpretation has surrounded statutes outlawing the victimization of law enforcement officers. A common scenario involves an offender who assaults or batters an undercover law enforcement officer with no knowledge of the officer's special status. Indeed, the officer generally takes great pains to conceal her true occupation from the offender. Thinking that the officer is a compatriot or other criminal, the offender assaults the officer. The offender is surprised to later learn the victim's true identity as a law enforcement officer and the enhanced penalty that attaches to the offense as a result.

Regrettably, the starting point of many analyses on this issue is the United States Supreme Court's opinion in *United States v. Feola*.<sup>33</sup> *Feola* provides a particularly poor foundation for thoughtful consideration because it is both frustratingly unclear and based almost entirely on a jurisdictional analysis that has no application in non-federal cases. At issue in *Feola* was "whether knowledge that the intended victim is a federal officer is a requisite for the crime of conspiracy, under 18 U.S.C. § 371, to commit an offense violative of 18 U.S.C. § 111, that is, an assault upon a federal officer while engaged in the performance of his official duties."<sup>34</sup> The *Feola* defendant and his confederates had arranged to sell a quantity of heroin to buyers who were in fact undercover federal officers.<sup>35</sup> But rather than deliver actual heroin, the sellers intended to sell a sugar substitute and, if discovered,

28. See, e.g., *id.* 5/12-2(b)(1) (assault with knowledge that the victim is age sixty or older or physically handicapped); VA. CODE ANN. § 18.2-57(D) (2016) (battery knowing or having reason to know that victim was a school employee).

29. See, e.g., LA. STAT. ANN. § 14:34(B) (2016) (enhancing punishment if the offender knew or should have known that the victim was an active member of the armed forces or a disabled veteran "and the aggravated battery was committed because of that status").

30. See, e.g., WASH. REV. CODE § 9A.36.031(1)(g) (2016) (assault on a law enforcement officer).

31. See, e.g., *State v. Morey*, 427 A.2d 479, 483 (Me. 1981) (requiring knowledge of the victim's identity as a prison official).

32. See, e.g., *State v. Brown*, 998 P.2d 321, 326-28 (Wash. 2000) (finding that knowledge that victim was a law enforcement officer is not an element of assault on a law enforcement officer).

33. 420 U.S. 671 (1975).

34. *Id.* at 672-73 (footnote omitted).

35. *Id.* at 674.



simply “surprise their unwitting buyers and relieve them of the cash they had brought along for payment.”<sup>36</sup>

The majority opinion identified the “federal officer” component of the assault statute as “jurisdictional.”<sup>37</sup> After all, the federal government needs a jurisdictional basis to criminalize conduct; it cannot simply outlaw every wrongdoing that goes on within its borders.<sup>38</sup> According to the majority, scienter is not needed to support an element of an offense that is present *only* to confer jurisdiction over the offense.<sup>39</sup> Thus, the operative question in *Feola* was whether the requirement that the victim be a federal officer was “jurisdictional only.”<sup>40</sup>

The majority went on to identify two non-jurisdictional purposes of the statute: to protect federal law enforcement personnel and to guard against interference with federal functions.<sup>41</sup> The Court found that “rejection of a strict scienter requirement is consistent with both purposes.”<sup>42</sup> While conceding that scienter would be necessary if the statute were simply an aggravated assault statute meant to fill holes in state statutes that did not enhance penalties for assaults on federal agents, the Court found that a primary purpose of the statute was to overlap with the coverage of state law while providing a federal forum for the prosecution of offenses against federal agents.<sup>43</sup>

The majority ultimately concluded that the statute required only intent to assault, not intent to assault a federal officer specifically, and that any contrary interpretation would give insufficient protection to undercover officers and officers enforcing unpopular laws because these officers would have to rely on state prosecutors to bring their assaulters to justice.<sup>44</sup> The Court found that the defendants suffered no unfairness because they knew they were acting illegally, even if they did not know the particular identities of their victims, and “[i]n a case of this kind the offender takes his victim as he finds him.”<sup>45</sup>

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36. *Id.*

37. *Id.* at 676.

38. *See, e.g.,* United States v. Lopez, 514 U.S. 549 (1995) (holding that federal statute criminalizing possessing a firearm in a school zone exceeded Congress’ commerce clause authority).

39. *Feola*, 420 U.S. at 676 n.9.

40. *Id.* (noting that “[t]he question . . . is not whether the requirement is jurisdictional, but whether it is jurisdictional only”).

41. *Id.* at 678-79.

42. *Id.* at 679. This statement seems to contradict a previous statement that if the statute “is seen primarily as an anti-obstruction [of government functions] statute, it is likely that Congress intended criminal liability to be imposed only when a person acted with the specific intent to impede enforcement activities.” *Id.* at 678.

43. *Id.* at 683-84.

44. *Id.* at 684.

45. *Id.* at 685. This line of reasoning was reflected in an earlier decision from the Fifth Circuit, which also found no knowledge requirement in 18 U.S.C. § 111: “When there is no

The *Feola* decision is inextricably tied to the jurisdictional nature of the “federal officer” component of the federal statute. The Court’s opinion, however, fails to clearly explain whether the federal officer requirement is jurisdictional only (although it appears that it is not), and, if not, why scienter is not required for conviction. The dissenting justices interpreted the majority opinion as reading the federal officer requirement as jurisdictional only, and endeavored to show why that interpretation was faulty.<sup>46</sup> Finding that the federal officer requirement was designed to deter assaults on federal officers (thus protecting both the officers and their functions) and to reflect the “societal gravity associated with assaulting a public officer,”<sup>47</sup> the dissent would have applied the statute “only where an assailant knew, or had reason to know, that his victim had some official status or function.”<sup>48</sup>

The Supreme Court later applied the dictates of *Feola* in *United States v. Yermian*,<sup>49</sup> a case dealing with whether the offense of making a false statement in any matter within the jurisdiction of a federal agency requires knowledge that the statement was made with regard to a matter within a federal agency’s jurisdiction. Finding the within-a-federal-agency’s-jurisdiction element to be jurisdictional only, the majority held that, like the federal agent requirement in *Feola*, no scienter was required with respect to that element to sustain a conviction.<sup>50</sup> The three dissenting Justices would have found the statute ambiguous and applied the rule of lenity to require the government to prove the defendant’s actual knowledge that his statements were made within the jurisdiction of a federal agency.<sup>51</sup>

Unlike the federal system, a state’s jurisdiction to criminalize activity is based on geography rather than subject matter. Thus, the peace officer element of a state statute criminalizing assaults on peace officers lacks the jurisdictional component found in a similar federal statute outlawing assaults on federal officers. Because the victim-fo-

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doubt of the defendant’s unlawful intention, knowledge of the official capacity of the victim is invariably unnecessary; the assailant takes his victim as he finds him.” *United States v. Young*, 464 F.2d 160, 163 (5th Cir. 1972).

46. *Feola*, 420 U.S. at 697-98 (Stewart, J., dissenting) (noting that the majority’s “jurisdictional only” interpretation “is inconsistent with the pertinent legislative history, the verbal structure of § 111, accepted canons of statutory construction, and the dictates of common sense”).

47. *Id.* at 698.

48. *Id.* at 699. The dissent found it immaterial whether the assailant knew that the victim was a federal officer rather than a state or local officer, as that matter was “jurisdictional only.” *Id.*

49. 468 U.S. 63 (1984).

50. *Id.* at 68 (“Jurisdictional language need not contain the same culpability requirement as other elements of the offense.”).

51. *Id.* at 83 (Rehnquist, J., dissenting).

cused element in a state statute is not jurisdictional, different considerations inform whether a scienter requirement should attach to the element. Many state statutes explicitly require scienter regarding the special trait of the victim.<sup>52</sup> Some explicitly exclude scienter as an element.<sup>53</sup> Others, however, are more ambiguous and thus fodder for judicial interpretation.

Several state courts have refused to read any scienter requirement into otherwise silent statutes of this kind. The Supreme Court of South Dakota declined to require knowledge of the victim's official status for conviction under an aggravated assault statute criminalizing the actions of any person who "[a]ttempts to cause or knowingly causes any bodily injury to a law enforcement officer or other public officer engaged in the performance of his duties."<sup>54</sup> The court's holding is based on its perception of the legislature's intent as communicated through the wording of the statute.<sup>55</sup> The Supreme Court of Washington arrived at the same result by interpreting the plain meaning of the language of its state's statute outlawing assaults on law enforcement officers.<sup>56</sup>

Basing its decision explicitly on the reasoning of *Feola*, the Supreme Court of Pennsylvania held that scienter was only necessary to safeguard against criminalizing activity that was otherwise lawful: "the defendant's ignorance of the victim's official status is irrelevant since he knows from the outset that his planned course of conduct is unlawful."<sup>57</sup> Echoing *Feola*, the high court of Pennsylvania held that

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52. See, e.g., COLO. REV. STAT. § 18-3-203(1)(f) (2016) (requiring that "the person committing the offense knows or reasonably should know that the victim is a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties," among other classes of individuals); NEV. REV. STAT. § 200.481(2)(c)(3) (2015) (enhancement requires that "[t]he person charged knew or should have known that the victim was an officer, provider of health care, school employee, taxicab driver, transit operator or sports official"); see also *Hubbard v. State*, 725 S.W.2d 579, 580-81 (Ark. Ct. App. 1987) (finding that the state failed to adequately demonstrate that criminal defendant knew that battery victim was at least sixty years old); *People v. Smith*, 16 Cal. Rptr. 2d 820, 822-24 (Cal. Ct. App. 1993) (holding that statutory requirement that advanced age of the victim must be known or "reasonably should be known" by the offender was not unconstitutionally vague); *People v. Jasoni*, 974 N.E.2d 902, 908-10 (Ill. App. Ct. 2012) (finding sufficient circumstantial evidence to support finding that criminal defendant knew that his victim was at least sixty years old).

53. See FLA. STAT. § 784.08(2) (2016) (enhancing the class of offense for assault or battery on a person aged sixty-five or older "regardless of whether [the offender] knows or has reason to know the age of the victim").

54. *State v. Feyereisen*, 343 N.W.2d 384, 386 (S.D. 1984).

55. *Id.* ("The legislature did not intend to include knowledge of the victim's identity as an element of the offense. And this Court cannot and should not amend a statute to avoid or produce a particular result.").

56. *State v. Brown*, 998 P.2d 321, 326-28 (Wash. 2000) (finding that the legislature had not required knowledge of a victim's status as a law enforcement officer and thus declining to read such a requirement into assault statute).

57. *Commonwealth v. Flemings*, 652 A.2d 1282, 1285 (Pa. 1995).

the defendant, knowing his action to be wrongful, “takes his victim as he finds him.”<sup>58</sup> Other courts have adopted this approach, noting that the extent of the injury caused by an assault is generally a matter of luck not subject to any scienter requirement.<sup>59</sup> An important exception is that knowledge of the victim’s status as a law enforcement officer becomes relevant if the defendant claims that she believed that she lawfully acted in self-defense. In such cases, a showing that the defendant knew the victim to be a law enforcement officer will defeat a claim of self-defense.<sup>60</sup>

Some courts have also refused to read a scienter requirement into statutes enhancing the punishment based on the age of the victim.<sup>61</sup> The rationale is based again on the idea that the defendant assumes the risk of the unlucky outcome of wrongful conduct. One court analogized the age of victim to the amount of property taken during a theft: the result of the intentional act need not be intended for that result to enhance the punishment.<sup>62</sup> Illinois courts repeatedly found that conviction for aggravated battery on a person over the age of sixty did not require proof that the assailant had prior knowledge of the victim’s

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58. *Id.* (citing *United States v. Feola*, 420 U.S. 671, 685 (1975); *United States v. Young*, 464 F.2d 160, 163 (5th Cir. 1972)).

59. *See State v. Cebuhar*, 567 N.W.2d 129, 134 (Neb. 1997) (analogizing an unwitting assault on a peace officer to a case where “a defendant may assault a person, intending to cause bodily injury, but nevertheless be charged with the felony of first degree assault if serious bodily injury is actually inflicted”).

60. Like the Court in *Feola*, the *Flemings* court recognized “the defendant’s ignorance of an officer’s official status is relevant in those rare cases in which an officer fails to identify himself and then engages in a course of conduct which could reasonably be interpreted as the unlawful use of force directed either at the defendant or his property” on the theory that the defendant’s assault would usually be justified on the basis of self-defense or defense of property. *Flemings*, 652 A.2d at 1285; *see also Commonwealth v. Francis*, 511 N.E.2d 38, 40-41 (Mass. Ct. App. 1987) (finding that knowledge was relevant where statute did not explicitly require that the offender have knowledge of the victim’s status as a correctional officer, but the offender claimed that he believed he was protecting himself against an attack by other inmates); *Dotson v. State*, 358 So. 2d 1321, 1323 (Miss. 1978) (finding that knowledge is a requirement where the defendant “reasonably could have assumed that the individual was some person unconnected with the police department, who may have been attempting to do him some bodily harm”).

61. *See People v. Suazo*, 867 P.2d 161, 170 (Colo. App. 1993) (“The plain language of the assault on the elderly statute convinces us that the offense was meant to be a strict liability offense.”); *Bryant v. State*, 599 So. 2d 1349, 1351-52 (Fla. 1st DCA 1992) (finding no knowledge requirement for conviction of aggravated assault or battery upon a person sixty-five years of age or older); *Carter v. Nevada*, 647 P.2d 374, 377 (Nev. 1982) (per curiam) (finding no constitutional issue with statute that enhanced punishment without requiring knowledge of the victim’s enhanced age); *Zubia v. State*, 998 S.W.2d 226, 226-27 (Tex. Crim. App. 1999) (en banc) (per curiam) (finding that conviction for injury to a child did not require any culpable mental state with regard to the age of the victim).

62. *Suazo*, 867 P.2d at 170.

age.<sup>63</sup> The rationale was that “[t]o require such knowledge would be to nullify the statute, because a person’s age is not as readily ascertainable as the status of a person, such as fireman or policeman.”<sup>64</sup> The Illinois legislature has since amended the statute to require prior knowledge of the victim’s age as an explicit element of the offense, effectively legislatively overruling the contrary judicial decisions.<sup>65</sup>

When confronted with silent or ambiguous statutes, other state courts have imposed a scienter requirement in conjunction with the victim’s special status. The Supreme Court of Maine held that a knowledge requirement is required based on the deterrent and retributive purpose of the punishment enhancement:

[W]e cannot see how imposing liability for assault on a prison official without also requiring knowledge of his identity could further the specific deterrent purpose expressed by the statute. Neither can we understand why an individual who commits an assault on a person he does not know to be an official is any more blameworthy than one who commits an assault punishable under [the general assault statute] and is thus any more deserving of the greater punishment for an offense of a higher class.<sup>66</sup>

The Maine court found that the reasoning of both the majority and dissent of *Feola* supported this result because, unlike the federal statute which was grounded on conferring federal jurisdiction, the state statute enhancing punishment for assault of a prison official was based on a desire to reflect the gravity of attacking prison officials and simultaneously to deter such attacks.<sup>67</sup> These statutory purposes are not furthered if the offender had no knowledge that the victim was a member of the special class.<sup>68</sup>

In a concurring opinion, a justice of the Supreme Court of Washington likewise opined that the deterrent and retributive rationales undergirding the enhancement supported a knowledge requirement on

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63. See *People v. White*, 608 N.E.2d 1220, 1228-29 (Ill. App. Ct. 1993); *People v. Jordan*, 430 N.E.2d 389, 391 (Ill. App. Ct. 1982) (tracing legislative intent of statute “to protect senior citizens who were defenseless and often the prey of muggers”).

64. *White*, 608 N.E.2d at 1229; see also *Jordan*, 430 N.E.2d at 391. But see *Zubia*, 998 S.W.2d at 229 n.4 (Meyers, J., dissenting) (“A peace officer or public servant is not necessarily identifiable as such by virtue of their physical appearance. On the other hand, a child, an elderly individual, and a disabled individual are more often than not identifiable as such based upon their physical appearance.”).

65. See 720 ILL. COMP. STAT. 5/12-3.05(d)(1) (2016) (requiring that offender “knows the individual battered to be” at least sixty years old); *People v. Jasoni*, 974 N.E.2d 902, 906 (Ill. App. Ct. 2012) (chronicling the statute’s amendment to include a knowledge requirement).

66. *State v. Morey*, 427 A.2d 479, 483 (Me. 1981).

67. *Id.* at 483-84.

68. Knowledge need not be shown through direct evidence, but could be demonstrated “by circumstantial evidence of the defendant’s behavior.” *Id.* at 485.

the part of the offender.<sup>69</sup> Finding that the purposes of the Washington statute were to punish and deter attacks on law enforcement officers because such attacks represent “not only a personal attack, but also an act of aggression against the very persons enlisted to secure public order,” and thus “a much more serious offense” than an attack against a private person, Justice Madsen disagreed with the majority’s holding that the Washington statute did not require knowledge of the victim’s law enforcement status.<sup>70</sup> Finding that the “fundamental purpose” of the statute is to “protect peace officers in the lawful discharge of their duties from unlawful assaults and batteries,” the Supreme Court of New Mexico similarly held that knowledge of the victim’s special status is a necessary element of a statute enhancing the punishment for assault on a peace officer.<sup>71</sup> Other courts have reached the same result, albeit with less comprehensive explanations of the reasoning behind the conclusion.<sup>72</sup>

In a rare judicial opinion dealing with scienter and an occupation other than law enforcement, an intermediate appellate court in New Mexico held that proof of the offender’s knowledge of the victim’s identity as a health care worker is a necessary element even though it is not expressly included as an element of the relevant battery statute.<sup>73</sup> The court found that the severity of the punishment consequence—raising the offense from a misdemeanor to a felony—was a relevant factor in determining that the victim’s occupation as a health care worker was not a strict liability element.<sup>74</sup> Finding that it would be “unfair” to enhance the potential consequence of the offense so severely based on the victim’s occupation if the occupation was unknown to the offender, the court presumed that the legislature intended a knowledge requirement in the statute.<sup>75</sup>

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69. *State v. Brown*, 998 P.2d 321, 328 (Wash. 2000) (Madsen, J., concurring).

70. *Id.* at 329 (“Without a requirement that the assailant have knowledge of the victim’s status, assaults against law enforcement officers are not deterred to any greater degree than other simple assaults.”).

71. *State v. Nozie*, 207 P.3d 1119, 1128 (N.M. 2009).

72. *See, e.g., Nelson v. United States*, 580 A.2d 114, 118 (D.C. 1990) (per curiam) (stating that “a defendant cannot be held criminally liable on the charge of assaulting a police officer . . . if the defendant did not believe, or have reason to believe, the complainant was a police officer”); *Fletcher v. United States*, 335 A.2d 248, 251 (D.C. 1975) (per curiam) (“The judge properly instructed the jury that the fact that the defendant knew or should have known that the complainants were police officers was an element of the offense.”); *see also State v. Allen*, 840 P.2d 905, 907 (Wash. Ct. App. 1992) (imputing an intent requirement to assault on a law enforcement officer because “[i]f the definition of a crime includes a particular result as well as an act, the mental element relates to the result as well as to the act”), *overruled by State v. Brown*, 998 P.2d 321, 326 (Wash. 2000).

73. *State v. Valino*, 287 P.3d 372, 376-78 (N.M. Ct. App. 2012).

74. *Id.* at 377.

75. *Id.* at 377-78.

### C. Types of Enhancements

The consequence of victimizing a member of a special class varies widely among jurisdictions, and among classes within each jurisdiction. Some special victims increase the class of offense from a misdemeanor to a felony<sup>76</sup> or increase the degree of the offense.<sup>77</sup> Others increase the maximum punishment to which the offender is subjected.<sup>78</sup> Others trigger a mandatory minimum prison term.<sup>79</sup>

This Article avoids close inspection of the resulting type of enhancement, although different enhancements carry different implications. An enhancement that only increases the statutory maximum punishment may be little more than a token if the actual sentences imposed are not greater than those imposed when an 'ordinary' victim is targeted. An enhancement that imposes a mandatory minimum, however, places great consequence on whether the victim was 'special' or 'ordinary' (unless, of course, the mandatory minimum is so minimal that sentences for ordinary victims already routinely exceed it). Because this Article rejects all victim-based statutory enhancements, the salient point is that the identity of the victim matters in some way to the statutory punishment; the type of enhancement is less important for purposes of this Article.

## III. CATEGORIES OF VICTIM-BASED SENTENCING ENHANCEMENTS

Review of state assault and battery statutes reveal several general motivations for specially protecting certain victims: (1) a desire to protect vulnerable individuals; (2) a desire to prevent victimization that would cause greater harm (or the risk thereof); (3) a desire to incentivize certain occupations or other undertakings; and (4) a desire to specially recognize or show appreciation to certain individuals.

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76. For example, in Minnesota it is a gross misdemeanor to assault and inflict demonstrable bodily harm on an employee of the Department of Natural Resources while engaged in forest fire activities, but it is a felony to do the same to a firefighter or emergency medical personnel in the course of her duties. MINN. STAT. § 609.2231(2), (2a) (2016). Intentionally inflicting great bodily harm upon an ordinary victim is simply a misdemeanor. *Id.* § 609.224(1); *see also* OR. REV. STAT. § 163.160(3)(d) (2015) (elevating assault in the fourth degree from a Class A misdemeanor to a Class C felony if the offender knows that the victim is pregnant).

77. *E.g.*, OHIO REV. CODE ANN. § 2903.12(B) (West 2015-2016) (aggravated assault is generally a felony of the fourth degree, but if the victim is a peace officer it is a felony of the third degree).

78. For example, the general punishment for assault in Oklahoma is imprisonment in a county jail for up to thirty days, a fine of no more than \$500, or both. OKLA. STAT. tit. 21, § 644(A) (2016). But assault on a court officer gives rise to a potential stay of up to one year in a county jail, a fine of up to \$1000, or both. *Id.* § 650.6(A).

79. *See, e.g.*, LA. STAT. ANN. § 14:34(b) (2016) (requiring one year of sentence without benefit of parole, probation or suspension for aggravated battery of a disabled veteran or active member of the military).

These purposes are not mutually exclusive; combinations of these rationales are often at play. For example, all four rationales could arguably apply to a sentencing enhancement for victimizing a law enforcement officer: officers are placed in vulnerable situations, harming an officer causes enhanced harm to society, society wishes to incentivize individuals to become officers, and officers are worthy of special recognition. Because certain enhancements are based on a combination of rationales, this Part proceeds with a separate discussion of each of the four rationales rather than each category of specially protected victim.

#### *A. Enhancements Based on Vulnerability-Related Characteristics*

Some folks are easy targets. Certain individuals are easier to assault or batter because of some trait (or lack thereof) that makes it more difficult for them to defend themselves from attack, identify their assailant, or summon assistance. Indeed, offenders may choose to rationally target these individuals precisely because they are easier to victimize.<sup>80</sup>

Vulnerability motivates sentencing enhancements for victimizing groups including children, the elderly, and disabled persons. These categories are both over- and under-inclusive. Some people who fall into one of the above categories are no easier to victimize than anyone else. And some people who do not fall into one of the above categories may be uniquely easy to victimize.<sup>81</sup> While the underlying rationale of increasing punishment when an offender targets a vulnerable victim is defensible, that purpose is poorly achieved by using traits such as age as proxies.

Greater punishment for offenders who victimize the vulnerable makes sense from both an incapacitation and deterrence-based perspective. Such an offender has shown herself to have a greater likelihood of future dangerousness, not because the offender has heightened culpability, but because she is a ‘smart’ criminal. Selecting a vulnerable victim is rational behavior on the part of the offender. ‘Smart’ crim-

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80. See, e.g., Angela Book, Kimberly Costello & Joseph A. Camilleri, *Psychopathy and Victim Selection: The Use of Gait as a Cue to Vulnerability*, 28 J. INTERPERSONAL VIOLENCE 2368, 2379 (2013) (“Targets who displayed vulnerable body language were more likely to report past histories of victimization, and psychopaths identified these individuals as being more vulnerable to future victimization.”).

81. Age is an especially problematic proxy for ease of victimization. As a group, the elderly are easier to victimize than those in the prime of life. But when the enhancement is triggered by ages as young as sixty, the likelihood of over inclusiveness increases, as does the difficulty with proving the offender’s knowledge of the victim’s age by evidence of the victim’s appearance.



inals attempt offenses they are likely to succeed at without apprehension. Selecting a victim who is at a disadvantage relative to the offender is 'smart' offending. Being a strategic or 'smart' offender does not increase the reprehensibility of the offense; offenders have no moral obligation to give the victim a fair opportunity to escape the offense.<sup>82</sup> Assuming that the offender does not have a particular victim in mind, one very rational step for the offender to take is to select a vulnerable victim.

By selecting a vulnerable victim and revealing herself to be a 'smart' criminal, the offender has disclosed a heightened likelihood of future dangerousness. If caught, incapacitation theory supports more stringent incapacitation for the very reason that the offender has shown herself to be effective at offending. Perhaps she has engaged in a string of offenses that went unpunished, whereas the less strategic criminal is immediately caught and punished after the first offense. Incapacitation theory supports a lengthier term of incarceration for offenders who knowingly target vulnerable victims.

Assuming that sentencing enhancements deter, vulnerability-based punishment enhancements make sense from a deterrence-based perspective. It is less costly for an offender to victimize a vulnerable person because it is more likely that the offender will successfully complete the offense and avoid apprehension. In order to even the playing field of deterrence, the punishment for victimizing the vulnerable must be increased until the disutility of victimizing a vulnerable individual matches the disutility of victimizing a non-vulnerable victim. If victimizing a non-vulnerable person has a rate of success of  $x$  and carries a

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82. From a retributive perspective, enhanced punishment for victimizing the vulnerable is problematic because victimizing vulnerable populations is inherently rational. If all else is equal, an offender will rationally target the victim who is easiest to victimize. An offender is not more *blameworthy* for making that calculation. Assaulting a defenseless person or robbing from the blind is only more reprehensible if the offender is obligated in some way to give the victim a fighting chance. Rather, offenders should be expected to rationally victimize the vulnerable, and such rational victim-shopping does not give rise to a larger just desert.

Consider an offender who grabs street performers' money jars and runs off with them. Offender A only grabs money jars from disabled street performers who are physically unable to give chase. Offender B only grabs money jars from able-bodied street performers, but does so when the street performers are not paying attention (they are "temporarily disabled" by their distraction). Both offenders rob the same number of street performers of the same amount of money. Both are attempting to structure their offenses to maximize the likelihood of success. Nothing makes Offender A inherently more blameworthy.

Consider then Offender C, who only grabs money jars from able-bodied street performers when they are paying close attention to their money jars. Is Offender C less culpable because the street performers are more likely to catch her in the act? Or Offender D, who steals money jars but herself cannot run very fast—is she less culpable because she will almost surely be caught? Or Offender E, who carries a large sign that reads: 'Warning: I am about to steal your money jar'? All of the offenders are equally culpable—they all seek to steal the money jar. Some are just better at getting away with it. An offender's ability to get away with the crime does not increase her culpability for it.

punishment of  $y$ , then victimizing a vulnerable person with a  $2x$  rate of success must carry a punishment of  $2y$  for the punishment to have the same deterrent effect.

To put it another way, let's say that victimizing an ordinary person comes with the following average variables: a 50% chance of getting away with the offense and gaining fifty units of utility and a 50% chance of getting caught and suffering fifty units of disutility. But let's say that victimizing a vulnerable person carries a 75% chance of getting away with the offense with the same fifty units of utility. The rational criminal will prey upon the vulnerable victim every time because she is more likely to get away with the offense. A vulnerability-based enhancement that increases the severity of punishment to seventy-five units of disutility seeks to restore the balance so that the offender has no preference between vulnerable and non-vulnerable victims.

A possible fault in this logic is that offenders are in fact not deterred by increased severity of punishment to the same extent that they are deterred by increased certainty of punishment. Studies have shown that certainty of punishment has a greater deterrent effect than severity of punishment.<sup>83</sup> Thus, a vulnerability-based severity enhancement may have to be quite significant in order to counterbalance the increased likelihood of success incumbent in victimizing vulnerable populations. However, this criticism is policy-based: it argues that vulnerability-based sentencing enhancements do not efficiently achieve their deterrent purpose in the real world, not that deterrence itself is an inappropriate motivation. State legislatures are free to disagree and attempt to pursue deterrence through vulnerability-based enhancements.

Deterrence and incapacitation theory, however, only support vulnerable-victim enhancements when the offender has knowledge of the vulnerability. *Scienter* is a necessity to support enhanced punishment. Only offenders who both *know* of the victim's vulnerability and target the victim *based on* that vulnerability have shown themselves to be 'smart' criminals with enhanced prospects of future dangerousness. If the goal is to lock up or deter offenders who prey on easy targets, it is only sensible to enhance the punishment of offenders who knowingly and intentionally select easy targets.<sup>84</sup> These rationales fail to support enhancing the punishment for offenders who had no reason to know that the victim was particularly vulnerable because these offenders

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83. See Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 28 (2006) ("[C]ertainty and promptness of punishment are more powerful deterrents than severity.").

84. Issues of difficulty of proof may arise with latent disabilities or age. Certainly circumstantial evidence should be admissible to demonstrate that the offender knew (or should have known) of the victim's vulnerability. Mere observation of the victim will often suffice to put the offender on notice of the victim's vulnerability. But if the offender chose the victim at random or based on a *different* trait (e.g., the victim appears to be wealthy), punishing the offender more because the victim suffers from some unapparent disability does nothing to serve deterrence.

have not demonstrated an increased threat of future dangerousness. Offenders who unknowingly luck upon a victim with a latent vulnerability should not receive enhanced punishment.

As discussed above, many current statutes utilize a proxy for vulnerability such as age or disability. These proxies are woefully imprecise. If the punishment enhancement is meant to target offenders who select vulnerable victims, the punishment enhancement should be based on *vulnerability* itself rather than a characteristic of the victim that serves as a proxy for vulnerability. Vulnerability is not so difficult to measure as to require a substitute proxy such as age, gender, or disability. Plenty of older people, women, and disabled people are not inherently vulnerable to victimization.<sup>85</sup> Plenty of people who fit none of these categories are vulnerable.<sup>86</sup> An enhancement based on the vulnerability of the victim can be successfully implemented without reliance on proxies. Most notably, the federal sentencing guidelines contain an upward offense level adjustment that is applicable to *all* federal offenses “[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim.”<sup>87</sup> Instead of drawing a bright line declaring all members of a certain group ‘vulnerable’ or ‘non-vulnerable,’ the guidelines sensibly permit the sentencing judge to determine whether a specific victim was uniquely vulnerable to that offense.<sup>88</sup> Because of the vast differences in the capabilities of individual victims, vulnerability is a trait that is best measured on a case-by-case basis by the sentencing judge rather than one served by a statutorily based rigid proxy. A blanket “vulnerable victim” enhancement would also be robust enough to permit the sentencing judge to consider whether the victim was uniquely vulnerable at the time of the offense or to one class of offenses but not another. Case-by-case analysis would allow for the enhancement to be tailored to individual circumstances, for example, extending the enhancement to a bus driver on an otherwise empty bus in the middle of the night but not to a bus driver in the middle of the afternoon on a busy route.

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85. See, e.g., Eamon McNiff, *From Cane to Weapon: Senior Citizens Fight Back with Cane Fu*, ABC NEWS (Sept. 6, 2012), <http://abcnews.go.com/US/cane-weapon-elderly-fight-back-cane-fu/story?id=17162085> [<https://perma.cc/8HM7-QDBR>]; Dana Sauchelli et al., *Female Victims Fighting Back More Against City Muggers*, N.Y. POST (Jan. 27, 2014, 4:09 AM), <http://nypost.com/2014/01/27/female-victims-fighting-back-more-against-city-muggers/> [<https://perma.cc/P2DR-AZSX>].

86. Consider individuals who are ill, drunk, or high. See generally Katherine B. O’Keefe, Note, *Protecting the Homeless Under Vulnerable Victim Sentencing Guidelines: An Alternative to Inclusion in Hate Crime Laws*, 52 WM. & MARY L. REV. 301 (2010) (discussing vulnerability as applied to homeless individuals).

87. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (U.S. SENTENCING COMM’N 2016).

88. The commentary defines a vulnerable victim as a person who is a victim of the offense or relevant conduct and “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.” *Id.* at § 3A1.1 cmt. n.2.

In sum, vulnerability-based sentencing enhancements may be legitimately supported by deterrence and incapacitation theories. Legislatures that seek to further those goals may elect to create such a statutory enhancement, either applicable to all offenses or to a certain subset of offenses. However, to better further these goals, the enhancement should explicitly be based on the vulnerability of the victim rather than an imprecise proxy such as age, disability, or other personal or occupation-based characteristics.

### *B. Enhancements Based on the Infliction or Risk of Greater Harm*

Attacks on certain individuals carry the risk of additional harm beyond just the infliction of injury to the individual. A battery on an individual engaged in a beneficial enterprise not only physically harms the direct victim but also disrupts the beneficial enterprise. Such a disruption may visit a minimal harm on society or, in the case of disrupting a life-saving enterprise, may result in a secondary harm that dwarfs the direct injury of the attack itself.

The overwhelming majority of occupation-based punishment enhancements require that the victim be engaged in her official functions at the time of the offense. The focus of these enhancements is the protection of the beneficial enterprise rather than the protection of the individual engaged in the enterprise.<sup>89</sup> The physical protection of the individual is assumedly adequately accounted for by the non-enhanced battery statute; the incremental punishment for battering an individual in the course of her occupation accounts for the disruption to the carrying on of the occupation.

These disruptions may be grouped into those which may lead to a tangible harm and those which may lead to an intangible harm. A tangible harm is an injury to a third party or to physical property. Battering a firefighter may result in a building burning down. Battering a lifeguard may result in a child drowning. Battering a transit operator may result in a train crash. An intangible harm is the disruption of a beneficial pursuit, such as disrupting the teaching functions of a school teacher, or the justice-dispensing functions of a judge or other officer of the court. These two categories are by no means mutually exclusive; the victimization of an individual can certainly carry both tangible and intangible consequences—battering a school bus driver both disrupts the function of the timely delivery of children to their homes and may very well also result in the loss of control of the bus and concomitant

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89. Enhanced protection of the individual may also be warranted because the enterprise places the individual in a vulnerable position or otherwise increases the likelihood that the individual will be victimized.

physical injury of the occupants of the bus. Both tangible and intangible harms may be actual or merely involve the creation of the risk of such harm.

### 1. *Tangible Harms*

The criminal law is no stranger to enhancing punishment proportionate to the actual or potential infliction of harm.<sup>90</sup> Almost all jurisdictions already increase the statutory punishment for battery based on the amount of resulting physical harm to another individual.<sup>91</sup> These enhancements are often written broadly to capture resulting harm to third parties (e.g., victims other than the direct victim of the physical attack).<sup>92</sup> These enhancements are supportable by retributivism and incapacitation theory because the infliction of greater harm is indicative of both greater culpability and a greater likelihood of future dangerousness. An offender who inflicts serious bodily injury today may be more likely to inflict serious bodily injury tomorrow than an offender who only inflicted minor bodily injury today.

In short, statutory sentencing enhancements based on the occupation of the victim are simply unnecessary to account for greater resulting physical harm because battery statutes are already written to specifically account for greater resulting physical harm. If an offender batters a firefighter or a lifeguard in an emergency situation and as a result a third party suffers serious bodily injury, the statutory punishment range will be enhanced on account of that serious bodily injury. A separate statutory enhancement based on the direct victim's occupation as a lifeguard or a firefighter is unnecessary to capture the greater actual resulting harm. Moreover, battering a firefighter, lifeguard, or transit operator may not lead to any *actual* additional harm if there is no ongoing fire, no drowning child, or no bus crash. Thus, occupation is

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90. See *Payne v. Tennessee*, 501 U.S. 808, 819 (1991) (“[T]wo equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm.”).

91. See, e.g., KY. REV. STAT. ANN. §§ 508.010-508.030 (West 2016) (differentiating degrees of assault based upon, *inter alia*, whether the offense resulted in “physical injury” or “serious physical injury”); MICH. COMP. LAWS §§ 750.81(1)-750.81a(1) (2017) (differentiating punishment for assault and battery based on whether victim suffered “serious or aggravated injury”). Unlike physical harm to a person, damage of tangible property that results from a battery is not included as a statutory enhancement to battery statutes. Such an enhancement is unnecessary, however, as long as the statutory punishment range is broad enough to permit the sentencing judge to take account of resulting property damage in the sentencing decision. In egregious cases where the resulting damage to property overshadows the battery offense, the offender could be charged with a property offense in addition to the battery offense.

92. See, e.g., IND. CODE § 35-42-2-1(d)(1) (2016) (enhancing battery offense if it “results in bodily injury to *any other person*” (emphasis added)).

an imprecise proxy for actual harm; if legislatures seek to enhance punishment based on actual infliction of tangible harm, then statutes should do so explicitly. When no actual additional harm results from the attack, enhancing punishment based on the occupation of the victim simply fails to serve as a fitting proxy for harm inflicted.

Of course, legislatures may seek to punish the *risk* of greater harm even if no greater harm actually resulted. Battering a firefighter at the firehouse creates the risk that a building will burn down during the battery. Battering a lifeguard at her station creates the risk of a drowning. Battering a transit operator creates the risk, but not the certainty, of a crash. If no building burns, no child drowns, and no crash ensues, the batterer has created a *risk* of additional harm even in the absence of greater *actual* harm.

When an offender creates the risk of additional harm, the occurrence or nonoccurrence of that harm is simply a matter of fortuity.<sup>93</sup> Despite the chance nature of the result, the criminal law generally treats an offender who only risks harm much less severely than one who actually inflicts harm. Moral luck is “the principle that an offender is justly to blame if his conduct causes harm, even if the occurrence of that harm is fortuitous.”<sup>94</sup> Moral luck is common in the criminal law even if not universally accepted.<sup>95</sup> Thus, a reckless drunken driver who fortuitously meets no one on the road will generally receive a much less severe punishment than one with the ill fortune of running down a pedestrian around a blind corner. Assuming that both drivers created the same amount of risk, it is not immediately obvious why the chance existence of a pedestrian should be of such a large consequence to the punishment determination, but American criminal law is consistent in its infliction of greater punishment on the basis of actual harm.<sup>96</sup>

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93. Certainly some batteries create a greater risk of harm than others. Battering a lifeguard while a child is actively drowning creates a much greater risk of additional harm than battering a lifeguard at a beach with few swimmers and numerous lifeguards during calm waters. Yet, in both cases, a child may drown or may not drown.

94. Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1105 (1997).

95. See generally David Enoch & Andrei Marmor, *The Case Against Moral Luck*, 26 LAW & PHIL. 405 (2007) (describing the concept of moral luck and arguing that the philosophical case for its existence “has not been convincingly established”); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974) (arguing against a results-based approach to sentencing).

96. For example, a failed attempt at an offense may be treated differently than a completed offense. Simons, *supra* note 94, at 1106 n.96. Similarly, offenses with easily quantifiable aspects, such as property offenses, often tie the punishment to quantity. The punishment doled out upon thieves is often tied in a meaningful way to the dollar amount of the theft, even though presumably almost every thief would have taken more loot had it been

However, a state legislature may reasonably seek to enhance punishment based simply on the creation of the risk of harm rather than the infliction of greater actual harm. Battery statutes currently do not provide statutory punishment enhancements for creating an un consummated risk of harm. Depending on the jurisdiction, however, creating a risk of harm may rise to the level of the separate offense of reckless endangerment. When the risk is high, like the battery of emergency personnel during an emergency, the battery will almost always also meet the elements of reckless endangerment. While a milder level of risk may not rise to the level of reckless endangerment, it could be considered as an aggravating factor within the established 'ordinary' punishment range for battery.

To the extent that a jurisdiction wishes to enhance the punishment for battery based on risk of further harm rather than rely on an additional count of reckless endangerment, those jurisdictions should adopt a statutory enhancement that is expressly based on the risk of harm rather than on the occupation or other trait of the victim. Just like enhancements based on infliction of actual greater physical harm, an enhancement could be calibrated so that it is triggered by the creation of a substantial risk of serious physical injury to the direct victim or a third party. Such an enhancement would be much more cleanly targeted than occupation-based enhancements because occupation-based enhancements are imperfect proxies for risk of harm. Battering a lifeguard on a deserted beach when many other lifeguards are on duty does not create a substantial risk of greater harm. A competent fact finder is perfectly capable of determining whether an offense creates a substantial risk of serious injury to another based on the actual factual scenario. A proxy is not needed to accomplish the job. Thus, risk-based statutory enhancements should be triggered directly by the creation of risk rather than by a victim-characteristic proxy for risk.

## 2. *Intangible Harms*

In the assault and battery context, an intangible harm is the disruption or interference with some intangible pursuit. In other words, it is an interference with a beneficial undertaking. It is a battery that disrupts an educator from educating, a student from learning, a judge from judging, or any number of beneficial undertakings. The additional injury is to the victim's beneficial function. Because that func-

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there for the taking. The difference in a pickpocket's punishment may be significant depending on whether the wallet held \$10 or \$1000 even though the dollar amount was unknown to the pickpocket at the time of the offense. *See id.* at 1107 n.101 (listing examples of state theft statutes, including Arkansas where theft of \$500 or less is a misdemeanor punishable by a maximum of one year in prison while theft of more than \$500 is a felony punishable by a minimum of three years' imprisonment).

tion is impaired, the harm is greater than if the same attack was visited upon the same victim at a time when she was not engaging in the beneficial function. Simply put, battering a school teacher on the weekend is less disruptive to her function as an educator than battering the same individual during school hours.

The difficulty with penalizing these disruptions through statutory enhancements is the lack of a natural stopping point, lest individual enhancements be carved out for every conceivable type of societally beneficial activity. An assault of a shopkeeper, or a ticket taker at a movie theater, or a picker of fruit in the course of her employment also disrupts societally beneficial activity. A battery of any one of these people in the course of employment is more harmful than an assault on an 'ordinary' victim because it also disrupts a productive function. But then, an assault on a student in the course of her studies disrupts the student's education in addition to whatever physical harm is caused. And an assault on a shop patron, or movie ticket purchaser, or an eater of fruit in the course of the activity disrupts the victim's consumption and therefore potentially her participation in the economy. Almost all activities can be described as productive or socially beneficial in some sense. Enacting statutory sentencing enhancements to capture the incremental additional harm caused by the interference with every socially beneficial activity would easily swell into an endless laundry list of enhancements that swallows the 'ordinary' punishment because at least one would be applicable in almost every case.

The inherent difficulty with coherently identifying socially beneficial activities deserving of greater protection may be illustrated by trying to fashion an inverse rule. If interference with socially beneficial activity is a negative, then interference with socially harmful activity is a positive. In accord with this thinking, legislatures would *decrease* the punishment applicable to victimizing individuals engaged in socially harmful activity. Therefore, an offender would be punished less harshly for battering a panhandler or a prostitute because it interferes with activities that have been deemed socially harmful. But raising and lowering the statutory punishment based on the victim's undertaking quickly devolves into ranking individuals and pursuits based upon their societal 'value' and punishing accordingly. Such an exercise is as endless as it is alarming.

A sounder course would be to leave such gradations to the sentencing judge. Almost every battery causes some disruption to productive society, but this disruption is usually minor when compared to the direct physical harm of the attack. In the mine run of cases, adjusting the sentence within the ordinarily applicable punishment range sufficiently accounts for the incremental intangible harm created by the disruption. In cases of significant or specific types of disruptions, the disruption itself is criminal and could form the basis of an additional



charge, like disturbing the peace or interfering with a judicial proceeding.<sup>97</sup> An offender whose battery results in such a *criminal* disruption can of course be prosecuted for both offenses—battery and criminal interference with, for instance, a judicial proceeding. Adding a statutory enhancement to the battery offense is unnecessary to capture the incremental harm and results in a troubling ranking of individuals' value to society; rather, the offender should be prosecuted for the additional count of criminal disruption or simply punished more harshly within the ordinary punishment range for any intangible harms attendant to the primary offense.

### 3. *Scienter*

Greater harm, be it tangible, intangible, actual, or risked, only supports the imposition of greater punishment if the offender knew (or at least should have known) of the greater harm at the time of the offense. If an offender knows that the victim of the battery is engaged in a beneficial undertaking, then the offender is responsible for interfering with that undertaking. But if the offender has no reason to know that the victim is, say, a police officer, then the offender should not be held responsible for interfering with that function. Particularly where the offender believes that the victim is a criminal, as is often the case with undercover police officers, the offender has every reason to suspect that battering the victim will only disrupt socially harmful behavior (in addition to the direct injury to the victim).

Some of the courts that reject scienter as an element reason that the offender knows that he is acting wrongfully and therefore is responsible for whatever resulting harm flows from that wrongful conduct.<sup>98</sup> In other words, the offender takes the victim as he finds him, whether that be a like-minded criminal or an undercover police officer. The extension of this reasoning is that if the offender did not know that he was engaging in wrongful conduct, then the unknown identity of the victim would not be sufficient to make the conduct criminal. Thus, an individual cannot successfully claim self-defense if the victim is a police officer unless the individual had no reason to know that the victim is a police officer.<sup>99</sup> In this case, the individual believes that his

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97. See, e.g., ARIZ. REV. STAT. ANN. § 13-2810 (2016) (offense of interfering with judicial proceedings); IOWA CODE § 719.1 (2017) (offense of interfering with official acts); MINN. STAT. § 609.50 (2016) (offense of obstructing legal process, arrest, or firefighting).

98. See, e.g., *Commonwealth v. Flemings*, 652 A.2d 1282, 1285 (Pa. 1995) (holding that an offender, knowing that he is acting unlawfully, “takes his victim as he finds him”).

99. *Id.* (explaining that “the defendant’s ignorance of an officer’s official status is relevant in those rare cases in which an officer fails to identify himself and then engages in a course of conduct which could reasonably be interpreted as the unlawful use of force directed either at the defendant or his property” because the defendant’s assault would usually be justified on the basis of self-defense or defense of property).

actions are justified and therefore non-wrongful. But when self-defense is removed from the equation, the individual knows he is acting wrongfully and therefore the argument goes that the offender essentially assumed the risk that he was mistaken regarding the identity of the victim.

But this distinction makes little sense. If the offender is fully protected by his mistake when he thought he was acting in self-defense against a non-police officer who in fact turns out to be a police officer, the offender should be partially protected when he thinks that he is battering a non-police officer who in fact turns out to be a police officer. If the victim turned out to be the President dressed in disguise and out for an incognito jog, it would make little sense to increase the punishment on the basis of the greater harm that results from disrupting the office of the President. The batterer would be highly surprised to learn that his victim was the President and very well may have chosen *not* to batter him if his identity was known in advance; it is simply a case of extremely bad moral luck. The offender's punishment should depend on his culpability, not on such fortuities. Thus, knowledge, or at least a reason to know, of the greater harm should be required before punishment is enhanced on this basis. Enhancing the punishment of an ignorant offender serves neither deterrence nor retribution.

#### 4. *Pregnant Individuals*

Numerous jurisdictions increase the potential punishment for victimization of pregnant persons.<sup>100</sup> For the enhancement to apply, usu-

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100. For example, in Maine, an assault in which the offender intentionally, knowingly, or recklessly causes serious bodily injury to another is generally categorized as the Class B offense of aggravated assault. ME. REV. STAT. tit. 17-A, § 208 (2016). However, intentionally or knowingly causing serious bodily injury to a pregnant person is an elevated aggravated assault, a Class A offense, if the offender knew or had reason to know of the pregnancy. *Id.* § 208-C.

ally the offender must have known or should have known of the pregnancy.<sup>101</sup> Other jurisdictions *separately* criminalize potentially harmful acts taken against an unborn child.<sup>102</sup> A few jurisdictions do both; thus, an assault on a pregnant individual may receive harsher punishment through two channels—the punishment enhancement applicable to assaulting a pregnant person plus a conviction and resulting punishment for the separate offense of injury to an unborn child.<sup>103</sup>

Statutory enhancements for the victimization of pregnant persons are unique in some respects. Pregnancy is distinct from occupational-based enhancements in the sense that a pregnant person is constantly pregnant, whereas a lifeguard is not constantly guarding lives. In that sense, pregnancy is a sounder proxy than some of the other enhancements discussed above. However, pregnancy remains an imperfect

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101. See, e.g., CONN. GEN. STAT. § 53a-59a(c) (2011) (providing that lack of knowledge that the victim was pregnant is an affirmative defense to a prosecution for assault on a pregnant person); FLA. STAT. § 784.045(1)(b) (2016) (enhancement to aggravated battery on the basis of the victim's pregnancy requires that offender "knew or should have known that the victim was pregnant"); IDAHO CODE ANN. § 18-904 (2016) (enhancement for battery of a pregnant victim requires that "this fact is known to the batterer"); 720 ILL. COMP. STAT. 5/12-3.05(d)(2) (2016) (aggravated battery on the basis of the victim's pregnancy requires the offender's knowledge of the pregnancy).

Where the offender's knowledge of the pregnancy is not required, the enhancement usually requires the resultant termination of the pregnancy or some harm to the unborn child and appears to be based upon the 'moral luck' principle that the offender takes the victim as he finds her and is responsible for any greater harm that directly results from the offense conduct. See, e.g., DEL. CODE ANN. tit. 11, § 605(b) (2016) (ignorance that the victim was pregnant is no defense to a prosecution for abuse of a pregnant female that results in termination of the pregnancy); *United States v. Price*, No. 4:06-CR-0053-1, 2012 WL 3027844, at \*7 (M.D. Pa. July 24, 2012) (analogizing the omission of knowledge of pregnancy as an element of the offense of distributing controlled substance to a pregnant individual to the omission of knowledge as an element of distributing controlled substances within 1000 feet of a school); *Sitton v. State*, 760 So. 2d 28, 31-32 (Miss. Ct. App. 1999) (en banc) (finding that knowledge that victim was pregnant is not an element of offense of injury to pregnant woman resulting in miscarriage); see also GA. CODE ANN. § 16-5-20(g) (2016) (text of assault statute does not require knowledge of victim's pregnancy to enhance offense from misdemeanor to misdemeanor of a high and aggravated nature). But see Michael H. Hoffheimer, *Murder and Manslaughter in Mississippi: Unintentional Killings*, 71 MISS. L.J. 35, 86 n.172 (2001) (arguing that *Sitton* does not hold that the offender's knowledge of the victim's pregnancy is not an element of the Mississippi statute).

102. See, e.g., ALASKA STAT. §§ 11.41.280, 11.41.282 (2006) (assault of an unborn child in first or second degree); NEB. REV. STAT. §§ 28-397, 28-398, 28-399 (2016) (assault of unborn child in first, second, or third degree); N.C. GEN. STAT. § 14-23.5(a) (2011) (specifying that assault on an unborn child requires a battery of the mother but is a "separate offense"); 18 PA. CONS. STAT. § 2606(a) (2016) (aggravated assault of unborn child); S.D. CODIFIED LAWS §§ 22-18-1.2, 22-18-1.3 (2016) (battery and aggravated battery of an unborn child who is subsequently born alive).

103. See, e.g., GA. CODE ANN. § 16-5-20(g) (2016) (enhancing simple assault against a pregnant victim from a misdemeanor to a misdemeanor of a high and aggravating nature); *id.* § 16-5-28 (separately criminalizing assault of an unborn child); 720 ILL. COMP. STAT. 5/12-3.05(d)(2) (2016) (aggravated battery on the basis of the victim's pregnancy); *id.* 5/12-3.1 (separately criminalizing battery and aggravated battery of an unborn child).

proxy if the concern is for the unborn child. Not all harms visited upon a pregnant individual also harm the unborn child, or even put the unborn child at risk of harm.

If the concern is for the unborn child, the punishment should be linked to harm to the unborn child rather than using harm to the pregnant individual as a proxy. A pregnancy-based enhancement for battery is unnecessary because, as discussed above, almost all jurisdictions already have a statutory enhancement based on the resulting physical harm to another individual. If a battery of a pregnant individual results in harm to an unborn child, the greater-harm enhancement will already reflect the determination to punish greater harms more severely.<sup>104</sup> A pregnancy-based enhancement therefore could lead to double-counting if the sentence was enhanced both on the basis of pregnancy and separately on the basis of greater harm. Similarly, if the motivation for the enhancement is vulnerability of pregnant individuals, a general “vulnerable victim” enhancement would be better-suited for the task than one that uses pregnancy as a proxy for vulnerability.<sup>105</sup> In order to avoid setting up multiple overlapping punishment enhancements based on imprecise proxies, enhancements should be triggered by the actual purpose underlying the enhancement (e.g., greater harm or victim vulnerability) rather than by proxy traits like pregnancy.

### *C. Enhancements Based on the Desire to Incentivize Certain Occupations or Undertakings*

Some occupation-based sentencing enhancements spring from a desire to incentivize individuals to take on these roles. Some socially beneficial undertakings place an individual in a potentially vulnerable situation. Many workers must go onto strangers’ properties or drive strangers in confined spaces. Other workers must take actions that are likely to anger others. While society may sensibly wish to incentivize people to assume such undertakings, the criminal law is not the proper vehicle to do so.

The array of state employees who are likely, by virtue of their official duties, to greatly upset some segment of the public is impressive.

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104. Similarly, if a jurisdiction found it to be warranted, a generic enhancement could be triggered by the creation of the risk of greater harm rather than on the actual infliction of harm. *See supra* Section III.B.1.

105. Certainly not all pregnant individuals are unusually vulnerable to all offenses, or even to all batteries. The determination should be a fact-dependent one.

Loosely grouped, some exert power over vehicles, such as parking control officers,<sup>106</sup> traffic officers,<sup>107</sup> vehicle inspection officers,<sup>108</sup> and traffic accident investigators.<sup>109</sup> Some work to safeguard people, such as employees of variously-named state departments charged with protecting children and preventing domestic abuse.<sup>110</sup> Others enforce various code provisions or investigate suspected violations, such as generic “code enforcement officers,”<sup>111</sup> animal control officers,<sup>112</sup> building or construction code inspectors or enforcers,<sup>113</sup> occupational health and

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106. *See, e.g.*, CAL. PENAL CODE § 241(b) (West 2016) (assault on parking control officer); FLA. STAT. § 784.07(2) (2016) (assault or battery of parking enforcement specialist); 18 PA. CONS. STAT. § 2702(c)(22) (2016) (aggravated assault on parking enforcement officer).

107. *See, e.g.*, CAL. PENAL CODE § 243(b) (West 2016) (battery of traffic officer); FLA. STAT. § 784.07(2) (2016) (assault or battery of traffic infraction enforcement officer); N.Y. PENAL LAW § 120.05(3) (McKinney 2016) (assault on traffic enforcement officer or agent).

108. *See* D.C. CODE §§ 22-404.02, 22-404.03 (2016) (assault and aggravated assault on public vehicle inspection officer).

109. *See* FLA. STAT. § 784.07(2) (2016) (assault or battery of traffic accident investigation officer).

110. *See, e.g.*, IDAHO CODE § 18-915(1) (2016) (assault or battery of social caseworkers or social work specialists of the department of health and welfare); IOWA CODE § 708.3A(1) (2017) (assault on employee of department of human services); LA. STAT. ANN. § 14:35.1 (2016) (battery of a child welfare or adult protective service worker); N.J. STAT. ANN. § 2C:12-1(b)(5)(e) (West 2016) (aggravated assault on employee of the Division of Child Protection and Permanency); V.I. CODE ANN. tit. 14, § 298(9) (2016) (aggravated assault and battery of investigator, caseworker, or other employee of departments of health or human services or other agency providing outreach services).

111. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1204(A)(8)(g) (2016) (aggravated assault); ARK. CODE ANN. § 5-13-202(a)(4)(A)(i) (2016) (battery); CAL. PENAL CODE § 243(b) (West 2016) (battery).

112. *See, e.g.*, CAL. PENAL CODE § 243(b) (West 2016) (battery of animal control officer); MINN. STAT. § 609.2231(6)(1) (2016) (assault on animal control officer); OR. REV. STAT. § 163.208(1) (2015) (assault on animal control officer).

113. *See, e.g.*, WIS. STAT. § 940.208(2) (2015-2016) (battery).

safety investigators,<sup>114</sup> agricultural inspectors,<sup>115</sup> sanitation enforcement agents,<sup>116</sup> liquor control enforcement agents,<sup>117</sup> conservation officers,<sup>118</sup> railroad officers,<sup>119</sup> and employees of the department of revenue.<sup>120</sup> Others work in law enforcement, including not just peace officers but various investigators<sup>121</sup> and support personnel such as Breathalyzer operators<sup>122</sup> and blood alcohol analysts.<sup>123</sup> The enforcement of codes, rules, and regulations often leave at least one party to the transaction with less-than-sunny feelings.

When it comes to those involved in the judicial process, North Dakota confers blanket protection upon any “person engaged in a judicial proceeding.”<sup>124</sup> Other jurisdictions specify certain actors, including

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114. *See* MINN. STAT. § 609.2231(6)(1) (2016) (assault).

115. *See id.*; *see also* IND. CODE § 35-42-2-1(a)(1)(F) (repealed 2014) (battery of state chemist or chemist’s agent engaged in duties relating to pesticide use or application); Snyder v. King, 958 N.E.2d 764, 783 (Ind. 2011) (interpreting § 35-42-2-1(a)(1)(F) prior to repeal).

116. *See* N.Y. PENAL LAW § 120.05(3) (McKinney 2016) (assault).

117. *See* 18 PA. CONS. STAT. § 2702(c)(8) (2016) (aggravated assault).

118. *See, e.g.*, MICH. COMP. LAWS § 750.81d(7)(b)(iii) (2006) (assault or battery of conservation officer of the department of natural resources or the department of environmental quality); 18 PA. CONS. STAT. § 2702(c)(33), (37), (38) (2016) (aggravated assault on an employee of Department of Environmental Protection, a wildlife conservation officer of state game commission, or a waterways conservation officer of state fish and boat commission); 11 R.I. GEN. LAWS § 11-5-5 (2016) (assault on environmental police officer).

119. *See, e.g.*, FLA. STAT. § 784.07(2) (2016) (assault or battery of railroad special officer); 11 R.I. GEN. LAWS § 11-5-5 (2016) (assault on railroad police).

120. *See, e.g.*, WIS. STAT. § 940.205 (2015-2016) (battery or threat to department of revenue employee).

121. *See, e.g.*, OHIO REV. CODE ANN. § 2903.11(D) (West 2015-2016) (assault on investigator of the state bureau of criminal identification and investigation); 11 R.I. GEN. LAWS § 11-5-5 (2016) (assault on investigator of department of attorney general).

122. *See, e.g.*, FLA. STAT. § 784.07(2) (2016) (assault or battery of breath test officer).

123. *See, e.g., id.* (assault or battery of blood alcohol analyst).

124. N.D. CENT. CODE § 12.1-17-01(2)(a) (2016) (assault).

judges,<sup>125</sup> prosecutors,<sup>126</sup> public defenders,<sup>127</sup> court officers or employees,<sup>128</sup> jurors,<sup>129</sup> witnesses,<sup>130</sup> court reporters,<sup>131</sup> bailiffs,<sup>132</sup> and process servers.<sup>133</sup> Some states enhance penalties for the victimization of family members of certain protected victims, such as the families of judges and other public officials.<sup>134</sup>

Examples of enhancements for assaulting or battering those required to enter the property of another include the special protection conferred to utility workers<sup>135</sup> and postal employees.<sup>136</sup> A Nevada assault statute directly targets home visitation by carving out special protection for any “employee of the State or a political subdivision of

125. *See, e.g.*, COLO. REV. STAT. § 18-3-202(1)(e.5) (2016) (assault); MONT. CODE ANN. § 45-5-210 (2015) (assault on judicial officer); N.J. STAT. ANN. § 2C:12-1(b)(5)(f) (West 2016) (aggravated assault on judge or justice); OH. REV. CODE ANN. § 2903.13(C)(9) (West 2016) (assault on judge or magistrate); VA. CODE ANN. § 18.2-57(C) (2016) (assault and battery of judge or magistrate).

126. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1204(A)(8)(f) (2016) (aggravated assault); N.Y. PENAL LAW § 120.05(11) (McKinney 2016) (assault); OHIO REV. CODE ANN. § 2903.13(C)(9) (West 2015-2016) (assault); 18 PA. CONS. STAT. § 2702(c)(11)-(14) (2016) (aggravated assault on attorney general, deputy attorney general, district attorney, or assistant district attorney).

127. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1204(A)(8)(i) (2016) (aggravated assault); 18 PA. CONS. STAT. § 2702(c)(15)-(16) (2016) (aggravated assault on public defender or assistant public defender).

128. *See, e.g.*, COLO. REV. STAT. § 18-3-202(1)(e.5) (2016) (assault); GA. CODE ANN. § 16-5-21(m) (2016) (aggravated assault on an officer of the court); WASH. REV. CODE § 9A.36.031(1)(j) (2016) (assault on judicial officer or court-related employee).

129. *See, e.g.*, OKLA. STAT. tit. 21, § 650.6 (2016) (assault or battery); WISC. STAT. § 940.20(3) (2016) (battery of grand or petit juror).

130. *See, e.g.*, CONN. GEN. STAT. § 53a-59(b) (2016) (assault on witness summoned to give testimony in official proceeding); OKLA. STAT. tit. 21, § 650.6 (2016) (assault or battery); WISC. STAT. § 940.201 (2015-2016) (battery or threat to witness).

131. *See, e.g.*, MISS. CODE ANN. § 97-3-7(1)(b), (2)(b) (2016) (simple and aggravated assault); OKLA. STAT. tit. 21, § 650.6 (2016) (assault or battery).

132. *See* OKLA. STAT. tit. 21, § 650.6 (2016) (assault or battery).

133. *See, e.g.*, CAL. PENAL CODE § 241(c) (West 2016) (assault); 720 ILL. COMP. STAT. 5/12-2(b)(10) (2016) (aggravated assault on person authorized to serve process or special process server).

134. *See* D.C. CODE § 22-851(d) (2016) (family members of public officials); N.H. REV. STAT. ANN. § 631:4-a (2016) (family members of certain government officials).

135. *See, e.g.*, ALA. CODE § 13A-6-21(a)(4) (2011) (assault in second degree with intent to prevent utility worker from carrying out lawful duty); MICH. COMP. LAWS § 750.81e (2010) (assault or battery of an employee or contractor of a public utility while the individual is performing her duties); MINN. STAT. § 609.2231(10)(1) (2016) (assault upon employee or contractor of a utility); MO. REV. STAT. § 565.081(1) (2016) (assault of utility worker or cable worker); 18 PA. CONS. STAT. § 2702(c)(36) (2016) (aggravated assault of public utility employee).

136. MINN. STAT. § 609.2231(10)(1) (2016) (assault upon employee or contractor of the United States Postal Service while engaged in duties). Employees of private delivery services seem similarly vulnerable as those of the federal postal service, but are not conferred the same protection.

the State whose official duties require the employee to make home visits.”<sup>137</sup> The legislative history indicates that the amendment was in response to an assault on a probation officer during a home visit,<sup>138</sup> but that the intention was to “protect” all government employees who make home visits, such as social workers, building inspectors, and meter readers.<sup>139</sup> Supporters of the bill testified that such employees are unaware of what adversarial conditions they may encounter during home visits and that a potential for violence accompanies such situations.<sup>140</sup> The legislative history of a Louisiana statute that confers added protection to utility workers<sup>141</sup> indicates that the bill was brought after four Cox Communications employees were assaulted with firearms during home visits in a two month period and the bill was offered to create “a more serious deterrent to this type of behavior.”<sup>142</sup>

Another set of special victims made vulnerable by their roles or occupations includes taxi drivers,<sup>143</sup> public transit operators,<sup>144</sup> and passengers.<sup>145</sup> These individuals are confined to small compartments with strangers, have little discretion over who they share that space with, and have few means of escape. During floor debate over a bill in the

137. NEV. REV. STAT. § 200.471(1)(b)(6) (2015).

138. *See* MINUTES OF THE ASSEMB. COMM. ON JUDICIARY, 71st Sess. (Nev. Apr. 19, 2001) (sponsor of the bill explained that it “was brought forth on behalf of a Parole and Probation Officer who was assaulted”).

139. *See id.*; MINUTES OF THE S. COMM. ON JUDICIARY, 71st Sess. (Nev. Feb. 15, 2001).

140. *Id.*

141. LA. STAT. ANN. § 14:37.5 (2016) (aggravated assault on utility worker with a firearm and the intent to prevent the performance of official duties).

142. La. H. Admin. of Criminal Justice Comm. Hearing, Apr. 20, 2006, at 1:22:20-1:24:56 (testimony of John Steele of Cox Communications: “To meet our customers’ needs, our employees must enter a person’s home or property, which occasionally puts them in the middle of a domestic disturbance or face-to-face with someone who is under the influence of alcohol or drugs.”), [http://house.louisiana.gov/H\\_Video/2006/Apr2006.htm](http://house.louisiana.gov/H_Video/2006/Apr2006.htm). The sponsor of the bill, Representative Danny Martiny, noted that utility workers have no choice but to go onto other people’s premises as a duty of their employment, much like bus drivers have to drive routes in undesirable neighborhoods. *Id.* at 1:25:30-1:26:55.

143. *See, e.g.*, D.C. CODE § 22-3751 (2016) (multiplying maximum fine and term of imprisonment for certain offenses against taxicab drivers by a factor of one and a half); NEV. REV. STAT. § 200.471(2)(c), (d) (2015) (assault of taxicab driver or transit operator); OR. REV. STAT. § 163.165(1)(i) (2015) (assault of taxi driver).

144. *See, e.g.*, DEL. CODE ANN. tit. 11, § 612(a)(3) (2016) (assault of public transit operator in lawful performance of duties); N.J. STAT. ANN. § 2C:12-1(b)(5)(g) (West 2016) (enhancing simple assault to aggravated assault when committed against an operator of a motorbus because of his status or while he is clearly identifiable as being engaged in the performance of his duties).

145. *See, e.g.*, 720 ILL. COMP. STAT. 5/12-2(b)(8) (2016) (aggravated assault on transit employee or passenger); WIS. STAT. § 940.20(6) (2015-2016) (battery to public transit vehicle operator, driver, or passenger).



Louisiana House that would confer special protection to bus operators,<sup>146</sup> the sponsor of the bill described bus drivers as “very, very vulnerable” on the basis of their employment.<sup>147</sup> To address the special vulnerability of picking up unknown passengers, the bill was narrowly drawn to exclude school bus drivers and charter bus drivers.<sup>148</sup> The rationale for the enhanced punishment was partially deterrence-based, with the sponsor hypothesizing that a would-be offender may elect not to assault a bus driver if the would-be offender knew of the enhanced penalty.<sup>149</sup> Importantly, this protection was also partially motivated to incentivize people to apply for jobs as bus drivers and to stay in those jobs once hired.<sup>150</sup>

As discussed above, it may be rational from a deterrent or incapacitative perspective to enhance punishment based on a victim’s vulnerability.<sup>151</sup> However, the criminal law should not be used as a vehicle to incentivize particular undertakings. Enhanced punishment is an inappropriate tool to incentivize individuals to undertake certain occupations, regardless of the occupation’s utility to society. The criminal law is a tool like no other. Enhancing an offender’s punishment from a misdemeanor to a felony carries significant consequences, including a

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146. The enacted statute was codified at LA. STAT. ANN. § 14:34.5.1 (2016).

147. La. H. Floor Deb., Apr. 23, 2003, at 2:04:58-2:05:18 (statement of Rep. Melinda Schwegmann), [http://house.louisiana.gov/H\\_Video/2003/Apr2003.htm](http://house.louisiana.gov/H_Video/2003/Apr2003.htm); see also *id.* at 2:06:52 (noting desire to put bus drivers “in the same category as other people whose jobs put them in a dangerous situation”).

148. *Id.* at 2:05:28-57, 2:09:30-2:10:36 (statement of Rep. Melinda Schwegmann noting attempt to narrow bill to only those bus drivers who are required to pick up unknown passengers as a requirement of their jobs); see also LA. STAT. ANN. § 14.34.5.1(B) (defining “bus operator” to include only employees of a public transit system and specifically excluding school bus operators).

149. La. H. Floor Deb., *supra* note 147, at 2:15:23-30 (statement of Rep. Melinda Schwegmann); see also Cal. S. analysis of Assemb. Bill No. 588 (1996 Reg. Sess.). (The sponsor of bill enhancing penalties for assault and battery on public transportation vehicles argued that penalties were necessary “to effectively deter violence against transit patrons.”); Cal. Assemb. Bill Analysis of Assemb. Bill No. 588 (1996 Reg. Sess.) (stating that enhanced penalties will “help prevent criminal acts from occurring”).

150. La. H. Floor Deb., *supra* note 147, at 2:13:05-13 (statement of Rep. Melinda Schwegmann: “How can you expect to hire bus drivers if you’re not saying ‘we’re going to prosecute someone who assaults you to the full extent of the law?’”).

151. Retributivism does not support these enhancements. As explained above, targeting the vulnerable is sensible offending and does not enhance culpability. See *supra* Section III.A. For offenders who lash out at those who have rendered a negative decision against them (e.g., have issued them a parking ticket or served them with divorce papers), the offense behavior is understandable in the sense that it falls within the range of expected human reactions. In other words, the offender has a motive to commit the assault, albeit not a justification nor an excuse. See Kevin Bennardo, *Of Ordinarity and Excuse: Heat-of-Passion and the Seven Deadly Sins*, 36 CAP. U. L. REV. 675, 675-77 (2008) (arguing that the ordinarity of a slayer’s reaction to a provocation should only constitute the heat of passion partial defense when the reaction itself is either excused or justified).

severe stigma and potentially a lifetime of difficulty securing employment and housing.<sup>152</sup> An individual offender should not suffer these extreme consequences because we as a society seek to attract more qualified candidates to be bus drivers or utility meter readers. If the government wishes to incentivize qualified people to become bus drivers, it should find ways to make the position more attractive, such as higher pay or enticing benefits. If safety is a primary concern, additional safety measures should be taken to protect bus drivers.<sup>153</sup> A desire to attract job candidates is not a proper purpose of punishment.

Secondly, with regard to ‘unpopular’ occupations, deterrence does not support enhancing the punishment for offenders who lash out at those who take unpopular (but societally beneficial) actions for the simple reason that angry people are unlikely to be deterred by the prospect of increased punishment. Angry individuals have been shown to be more difficult to deter than calm people.<sup>154</sup> An individual may become angry at a referee’s call, or with a process server’s service of divorce papers, or a parking control officer’s citation, or a witness’s adverse testimony. Although this anger is not righteous in the sense that it is morally deserved, it is understandable in the sense that it is a common or expected response. Individuals laboring under the lens of anger, righteous or not, are simply less responsive to future punishment as a deterrent.<sup>155</sup> When considered in tandem with the fact that

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152. See, e.g., COLLATERAL CONSEQUENCES RESOURCE CENTER, <http://ccresourcecenter.org> (last visited Aug. 17, 2015) (providing comprehensive overview of collateral consequences of conviction).

153. See, e.g., Edgar Sandoval & Pete Donohue, *Bus Drivers Get New Shield to Protect Them from Violent Passengers, but Some Fear It Is Not Enough*, N.Y. DAILY NEWS (Dec. 31, 2009), <http://www.nydailynews.com/new-york/bus-drivers-new-shield-protect-violent-passengers-fear-article-1.461528> [<https://perma.cc/8MBN-GM88>]; Richard Weir, *T Czar to Introduce Glass Partitions to Protect Bus Drivers*, BOSTON HERALD (Apr. 11, 2013), [http://bostonherald.com/news\\_opinion/local\\_coverage/2013/04/t\\_czar\\_to\\_introduce\\_glass\\_partitions\\_to\\_protect\\_bus\\_drivers](http://bostonherald.com/news_opinion/local_coverage/2013/04/t_czar_to_introduce_glass_partitions_to_protect_bus_drivers) [<https://perma.cc/J75N-DSRC>].

154. See Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1981, 1993-94 (2001) (noting that angry individuals discount future sanctions and therefore the threat of sanctions have diminished deterrent value). Also, heat of passion leads to a punishment *reduction* for murder. See *id.* at 1981 (noting that, depending on the motivation, anger can increase or decrease guilt). Although these batterers are not laboring under justified anger, that is not required for heat of passion slayings.

155. *Id.*; see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 7.2 (8th ed. 2011) (“The notion of the criminal as a rational calculator will strike many readers as unrealistic, especially when applied to criminals having little education or to crimes not committed for pecuniary gain. But . . . a better test of a theory than the realism of its assumptions is its predictive power.”).

severity of punishment does not deter as much as certainty of punishment,<sup>156</sup> deterrence is a decidedly poor justification for enhancing punishment in an attempt to protect individuals engaged in certain unpopular pursuits from angry offenders.<sup>157</sup>

#### *D. Enhancements Designed to Honor Certain Individuals*

Some individuals receive special protection, at least in part, to honor some function they play or have played in society. The special protection is a form of recognition of their service. Once a legislature starts down this path, however, it is difficult to mete out a stopping point. One legislator may propose special protection of military veterans, another legislator may propose special protection of teachers, and on and on. Besides the inherent difficulty of legislative self-restraint, the enhancement of criminal punishment is not a proper tool to honor particular individuals.

Louisiana punishes offenders who knowingly batter an active member of the United States Armed Forces or a disabled veteran with a mandatory minimum of imprisonment for one year if the battery was committed on the basis of that status.<sup>158</sup> Battery of an ‘ordinary’ person carries no mandatory minimum term of imprisonment.<sup>159</sup> Testimony before the relevant legislative committees described the bill as “a token to our men and women in uniform,”<sup>160</sup> a “nod to our soldiers,”<sup>161</sup> and “a salute to our military.”<sup>162</sup> Repeated statements were made during the legislative process to the effect that the penalty enhancement was warranted to demonstrate equal or greater respect and appreciation for members of the armed forces in comparison to occupations that

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156. See Tonry, *supra* note 83, at 28 (“[C]ertainty and promptness of punishment are more powerful deterrents than severity.”).

157. Moreover, increasing the punishment for battering a parking control officer or similarly unpopular occupation does not have a principled stopping point and leads to counter-intuitive results. Jurisdictions have not chosen to confer special protection on everyone who is more likely to be victimized. If the goal is to deter the victimization of likely victims, it would be sensible to enhance the punishment for robbing the rich or punching annoying people. But the perverse result of such an enhancement is to incentivize offenders to victimize individuals who are the least sensible victims—e.g., stealing from the poor and punching pleasant people.

158. LA. STAT. ANN. §§ 14:34(B) (aggravated battery), 14:34.1(C) (second degree battery) (2016).

159. Both offenses carry identical maximum terms of imprisonment. Aggravated battery and second degree battery are punishable by up to ten and five years’ imprisonment with or without hard labor, respectively. LA. STAT. ANN. §§ 14:34(B), 14:34.1(C) (2016).

160. La. H. Admin. of Criminal Justice Comm. Hearing, Mar. 28, 2012, at 7:05 (testimony of District Attorney Jerry Jones), [http://house.louisiana.gov/H\\_Video/2012/Mar2012.htm](http://house.louisiana.gov/H_Video/2012/Mar2012.htm).

161. La. S. Judiciary C Comm. Hearing, May 1, 2012, at 1:43:59 (testimony of District Attorney Jerry Jones), <http://senate.la.gov/Video/2012/May.htm#1>.

162. *Id.* at 1:45:53 (testimony of District Attorney Jerry Jones).

already carried enhanced penalties as victims of battery—e.g., “if we protect the energy worker, we should protect the veteran.”<sup>163</sup>

These statements are not confined only to protections for members of the military. For example, during floor debate in the Louisiana House of Representatives on a bill that would increase the punishment for battery of a school teacher, the bill’s sponsor advocated that the bill simply duplicated the enhanced punishment for battery of a police officer and that teachers “are just as important as law enforcement to our community.”<sup>164</sup> Statements also appear in numerous California legislative histories noting that bills proposing enhanced punishment for one group are consistent with various previous enhanced penalties afforded to other groups.<sup>165</sup> Once some critical mass of groups is protected by enhanced penalties, the tide of protecting further classes is hard to stem. After noting recently presented bills to enhance penalties for battering taxi drivers and security guards, one Louisiana Senator succinctly stated: “where does this stop on creating special classes?”<sup>166</sup> The answer, unfortunately, is that legislatures practice poor self-restraint in this area. If punishment enhancements are created to “honor” the protected group, legislatures are wont to identify group after group for recognition.

Moreover, enhancing punishments through the criminal law is not the proper tool for recognizing society’s appreciation of certain groups or individuals. Someone should not have to serve additional prison time to show veterans that society appreciates their service. Punish-

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163. La. H. Admin. of Criminal Justice Comm. Hearing, *supra* note 160, at 22:18 (testimony of District Attorney Jerry Jones), [http://house.louisiana.gov/H\\_Video/2012/Mar2012.htm](http://house.louisiana.gov/H_Video/2012/Mar2012.htm); *see also id.* at 1:45 (testimony of Rep. Jay Morris) (arguing that members of the armed forces are “equally deserving” for enhanced protection given the already-existing enhancements for batteries of police officers, school teachers, and bus operators); La. S. Judiciary C Comm. Hearing, *supra* note 161, at 1:41:11 (testimony of Rep. Jay Morris) (noting that the enhancement would be in line with other battery enhancements covering bus drivers and law enforcement officers).

164. La. H. Floor Deb., May 12, 2009, at 1:42:55 (statement of Rep. Ricky Templet), [http://house.louisiana.gov/H\\_Video/2009/May2009.htm](http://house.louisiana.gov/H_Video/2009/May2009.htm). Another representative challenged the bill’s sponsor with the question, “why are you talking about law enforcement officers?” *Id.* at 1:43:00 (question of Rep. Richard Gallot). The bill’s sponsor responded that teachers “deserve the same protection as law enforcement” because they educate the community. *Id.* at 1:43:20 (statement of Rep. Ricky Templet).

165. *See, e.g.*, Cal. S. Comm. Analysis of SB 1509 (Apr. 2, 2008) (explaining that the bill proposing enhanced punishment for assault of a highway worker “simply provide[s] similar protections” as those provided by existing law “for assaults on various public servants, including peace officers and operators of public transportation services”); Cal. Assemb. Comm. Analysis of AB 1686 (Apr. 17, 2007) (statement in support of bill enhancing penalty for assaulting parking control officers noted that it would extend existing penalties for assaults on other classes of public safety officers to parking control officers because “[a]ll public safety officers deserve to be treated with respect in the course of carrying out their duties”).

166. La. S. Floor Deb., May 7, 2012, at 1:42:10 (question of Sen. Dan Claitor), <http://senate.la.gov/Video/2012/May.htm#1>.

ment should only be enhanced—or imposed at all—for a purpose related to the criminal law, not as a hat tip or a sign of respect for a group to which the victim happens to belong. If the rationale for enhancing the punishment for battering a public bus driver is that the bus driver is vulnerable because she is required by her occupation to pick up unknown persons from the side of the road, it does not follow that the punishment for battering a military veteran must also be enhanced to show that society values military veterans at least as much as bus drivers. It only makes sense to similarly enhance the punishment for battering veterans if veterans are similarly vulnerable to victimization when compared to bus drivers. Otherwise legislatures quickly trod into dangerously inegalitarian territory by enhancing the punishment for victimizing ‘preferred’ groups in society and minimizing the punishment for victimizing (and thereby incentivizing the victimization of) less popular individuals and groups. That is a bad road to travel. Punishment should not be enhanced for the victimization of a group without a solid penological rationale.

#### IV. THE INEQUALITY OF VICTIM-BASED STATUTORY SENTENCING ENHANCEMENTS

Many believe that the United States is facing a widening of the inequality gap. Due to fallout from several recent highly publicized events, there is genuine concern that certain lives “matter” more than others.<sup>167</sup> The country faces heightened awareness and concern about social, financial, and racial inequality.<sup>168</sup> Statutes that categorize victims by age, disability, occupation, and the like and assign grades of punishment accordingly are particularly out of step with the times.

On their face, many of the statutory punishment enhancements may feel intuitive. When analyzed more closely, however, these enhancements lack a rational stopping point.<sup>169</sup> And, by selecting an arbitrary stopping point, they engender inequality. Consider the many statutes that enhance punishment for assaulting or battering a teacher or other school employee. Some draw the line at certain employees: a Rhode Island statute prohibits willfully or knowingly striking “a schoolteacher, student teacher, school security officer or school administrator” while the person is engaged in the performance of her

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167. For example, the Black Lives Matter movement, created in the wake of the 2013 acquittal of George Zimmerman, has broadened in scope to focus attention on “all of the ways in which Black people are intentionally left powerless at the hands of the state.” *See* BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> (last visited Dec. 6, 2016).

168. *See, e.g., Occupy Wall Street*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Occupy\\_Wall\\_Street](https://en.wikipedia.org/wiki/Occupy_Wall_Street) [<https://perma.cc/WL67-82NN>] (chronicling the many protests and demonstrations of the Occupy movement).

169. *See supra* Sections III.B.2, III.D.

duties.<sup>170</sup> In Mississippi, a punishment enhancement is triggered if the victim of an assault is a “superintendent, principal, teacher or other instructional personnel, school attendance officer or school bus driver.”<sup>171</sup> But if such an enhancement is sensible, surely it should also protect other school employees, such as cafeteria workers and custodians.<sup>172</sup> And non-employee volunteers at the school.<sup>173</sup> And students.<sup>174</sup> And outside vendors, visitors, parents, and other licensees and guests of the school. And the protection should extend beyond public primary and secondary schools to all levels of education both public and private.<sup>175</sup> And on and on.

Every category could be similarly questioned until it is meaninglessly expanded or capped at some arbitrary point.<sup>176</sup> These statutes, with their arbitrary lines, communicate that folks on one side of the line are more important or worthier of protection than folks on the other side of the line. The rational offender is incentivized to target victims who possess none of the triggering characteristics. Effectively, the statutes say: ‘the state prefers that you assault this person instead of this other person.’<sup>177</sup> This message violates the norm of social equality. It should be abandoned.

170. 11 R.I. GEN. LAWS § 11-5-7 (2016) (the offender must also act).

171. MISS. CODE ANN. § 97-3-7(14) (2011) (the victim must be acting within the scope of employment at the time of the assault).

172. Many states’ enhancements are triggered by an attack on any school employee. *See, e.g.*, OKLA. STAT. tit. 21, § 650.7 (2016) (“school employee,” including “a teacher, principal, or any duly appointed person employed by a school system or employees of a firm contracting with a school system for any purpose, including any personnel not directly related to the teaching process and school board members during school board meetings”); V.I. CODE ANN. tit. 14, § 298(8) (2016) (knowing assault of a “teacher or other person employed in any school”).

173. Very few states include volunteers along with school employees. *See* HAW. REV. STAT. § 707-711(1)(e) (2016) (defining educational worker to include volunteers); KY. REV. STAT. ANN. § 508.025(1)(a)(10) (West 2016); N.C. GEN. STAT. § 14-33(c)(6) (2016).

174. Very few states include students along with school employees. *See* GA. CODE ANN. § 16-5-21(j) (2016) (aggravated assault involving the use of a firearm within a school safety zone upon a student, teacher, or other school personnel); 720 Ill. Comp. Stat. 5/12-3.05(e) (2016) (aggravated battery based on use of firearm); OKLA. STAT. tit. 21, § 650.7 (2016) (assault or battery or both).

175. Some states limit the enhancement to public schools or elementary or secondary schools. *See, e.g.*, ALA. CODE § 13A-6-21(a)(5) (2016) (“employee of a public educational institution”); IDAHO CODE § 18-916 (2016) (“Every parent, guardian or other person who upbraids, insults or abuses any teacher of the public schools, in the presence and hearing of a pupil thereof, is guilty of a misdemeanor.”); KY. REV. STAT. ANN. § 508.025(1)(a)(9) (West 2016) (limited to elementary or secondary school employees); 18 PA. CONS. STAT. § 2702(a)(5) (2016) (same).

176. Another alternative is for the location of the offense to trigger the enhancement rather than a characteristic of the victim. *See, e.g.*, CAL. PENAL CODE § 241.2 (West 2016) (assault on school or park property); MO. REV. STAT. § 565.075 (2016) (assault on school property).

177. One particularly egregious example of line drawing makes it unlawful to cause any person lawfully present in a penitentiary to come into contact with certain bodily fluids *unless that person is an inmate*. N.D. CENT. CODE § 12.1-17-11(1)(d) (2016).

As explained above, the same goals can be accomplished through rewriting the statutes to focus on their underlying legitimate purposes rather than imperfect characteristic-based proxies. Triggering an enhancement for victimizing “vulnerable individuals” does not perpetuate inequality the way an enhancement triggered by targeting the young or the old or the disabled does. “Vulnerable” is not a static description; an individual may move in and out of the category over the course of a lifetime. More pointedly, an individual may be vulnerable to victimization for some offenses but not others. An enhancement for victimizing vulnerable individuals does not label any group as *per se* more deserving of protection than another.

Punishing offenses that have the likelihood of inflicting greater harms may be sensible. But to do so, society should not use enhancements triggered by the victimization of lifeguards, firefighters, and law enforcement officers. Such enhancements improperly communicate that individuals engaged in these occupations are more deserving of protection than others who work as fishermen, civil engineers, and lab technicians. Instead of categorizing victims by occupation, the enhancement should be keyed to the infliction (or risk of infliction) of greater harm.<sup>178</sup> For example, instead of carving out a special enhancement for assaulting an emergency medical technician, the same purpose is better served by enhancing the offender’s punishment for assaulting ‘any person while such person is rendering emergency care.’<sup>179</sup> Or, better yet, by enhancing the offender’s punishment when the offense resulted in the infliction of, or likely infliction of, significantly greater harm than the immediate injury to the primary victim.

These more nuanced enhancements are more flexible and will require a modicum of more judicial work. Indeed, they shift the burden of judging back onto judges. These punishment decisions should be driven by judgment, not by legislatively prescribed categories. Instead of simply determining whether the victim was working as process server<sup>180</sup> or agricultural inspector<sup>181</sup> or legislator<sup>182</sup> at the time of the offense, the sentencing judge should make the more meaningful determination of whether the victim was especially vulnerable or whether the offense conduct created the likelihood of greater harm. If so, the state’s legislature may determine that a statutory enhancement is

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178. *See supra* Section III.B.

179. Delaware’s second-degree assault statute is a hybrid of both approaches. *See* DEL. CODE ANN. tit. 11, § 612(a)(4)-(5) (2015) (intentionally causing “physical injury to the operator of an ambulance, a rescue squad member, licensed practical nurse, registered nurse, paramedic, [] licensed medical doctor . . . [or] any other person while such person is rendering emergency care”).

180. CAL. PENAL CODE § 241(c) (West 2016) (assault); 720 ILL. COMP. STAT. 5/12-2(b)(10) (2016).

181. MINN. STAT. § 609.2231(6)(1) (2016).

182. 18 PA. CONS. STAT. § 2702(a)(6), (c)(32) (2016).

proper. Removing the divisive labels, the per se categorization of victims based on certain binary traits, will both align better with egalitarian principles and further the underlying purposes of these enhancements.

## V. CONCLUSION

The practice of enhancing punishment based on characteristics of the victim is deeply entrenched in American criminal statutes. It should not be. Such trait-based statutory enhancements send the wrong message: that society prefers the victimization of some individuals rather than others. These enhancements create classes of “preferred victims” that do not square with our society’s aspirations of equality.

These trait-based enhancements serve as proxies for other purposes of enhanced punishment. Some of these purposes are legitimate uses of the criminal law and some are not. For example, seeking to deter offenses against vulnerable victims or to increase punishment based on the infliction or risk of infliction of greater harm are defensible rationales for enhancing punishment. Unfortunately, the proxies currently used in many state statutes, such as age, disability, and occupation, are imperfect substitutes for these rationales. Thus, legislatures should rewrite the statutes so that the enhanced punishment is linked directly to the underlying purpose of the punishment rather than to a physical or occupational characteristic of a victim. Other purposes that motivate these enhancements, such as a desire to incentivize certain occupations or to honor certain individuals, are not legitimate uses of criminal punishment. Enhancements based on these motivations should be repealed.



## APPENDIX. LIST OF SPECIALLY-PROTECTED VICTIMS BY JURISDICTION

**Alabama:** Peace officer, detention or correctional officer at any municipal or county jail or state penitentiary, emergency medical personnel, utility worker, firefighter, teacher, employee of a public educational institution, health care worker.<sup>183</sup>

**Alaska:** Child under twelve years of age, child under sixteen years of age but at least twelve years of age.<sup>184</sup>

**Arizona:** Person at least sixty-five years of age, disabled person, minor under fifteen years of age, peace officer, constable, firefighter, fire investigator, fire inspector, emergency medical technician, paramedic, teacher, person employed by any school, health care practitioner, prosecutor, code enforcement officer, state or municipal park ranger, public defender, public safety employee or volunteer, employee of the Arizona state hospital or the employing agency, correctional facility employee, private prison security officer.<sup>185</sup>

**Arkansas:** Woman who is pregnant with an unborn child, person twelve years of age or younger, law enforcement officer, firefighter, code enforcement officer, employee of a correctional facility, teacher or other school employee, individual sixty years of age or older, officer or employee of the state, physician, emergency medical services personnel, licensed or certified health care professional, health care provider, individual who is incompetent, athletic official.<sup>186</sup>

**California:** Parking control officer, peace officer, firefighter, emergency medical technician, mobile intensive care paramedic, lifeguard, process server, traffic officer, code enforcement officer, animal control officer, search or rescue member, physician, nurse, custodial officer, person on public transportation, highway worker, school employee, juror, alternate juror, member of the United State Armed Forces, operator or driver or passenger of bus or taxicab or streetcar or cable car or trackless trolley or other motor vehicle, school bus driver, station agent, ticket agent, sports official, elder or dependent adult under seventy years of age, elder or dependent adult seventy years of age or older.<sup>187</sup>

**Colorado:** Peace officer, firefighter, pregnant individual, emergency medical service provider, emergency medical care provider, mental

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183. ALA. CODE § 13A-6-21 (2016).

184. ALASKA STAT. § 11.41.220 (2016).

185. ARIZ. REV. STAT. ANN. §§ 13-701, 13-1204, 13-1210, 13-1212 (2016).

186. ARK. CODE ANN. §§ 5-13-201, 5-13-202, 5-13-209, 5-13-211 (2016).

187. CAL. PENAL CODE §§ 241, 241.1, 241.3, 241.4, 241.5, 241.6, 241.7, 241.8, 243, 243.1, 243.25, 243.3, 243.35, 243.6, 243.65, 243.8, 245, 245.2, 245.3, 245.5, 243.7, 368 (West 2016).

health professional employed by or under contract with the department of human services, elderly person, judge of a court of competent jurisdiction, officer of a court of competent jurisdiction, person employed by or under contract with a detention facility, person employed by the division in the department of human services responsible for youth services, employee of a detention facility.<sup>188</sup>

**Connecticut:** Person under ten years of age, witness, elderly person at least sixty years of age, blind person, disable person, pregnant person, person with intellectual disability in the first degree, employee of the Department of Correction, employee or member of the Board of Pardons and Paroles.<sup>189</sup>

**Delaware:** Law enforcement officer, hospital or nursing home employee, physician, medical professional, ambulance attendant, emergency medical technician, advanced emergency medical technician, paramedic, Delaware State Fire Police Officer, correctional officer, volunteer firefighter, full-time firefighter, pregnant female, fire marshal, sheriff, deputy sheriff, public transit operator, code enforcement constable, code enforcement officer, operator of an ambulance, rescue squad member, licensed practical nurse, registered nurse, licensed medical doctor, person who is sixty-two years of age or older, state employee, state officer, person who has not yet reached the age of six years, security officer, sports official (any person who serves as a registered, paid or volunteer referee, umpire, line judge, or acts in any similar capacity during a sporting event), child who is three years of age or younger, child who has significant intellectual or developmental disabilities, vulnerable adult.<sup>190</sup>

**District of Columbia:** Public vehicle inspection officer, law enforcement officer, official or employee of the District of Columbia, family member of an official or employee of the District of Columbia, vulnerable adult, individual who is sixty years of age or older, citizen patrol member, minor, taxicab driver, transit operator, Metrorail station manager.<sup>191</sup>

**Florida:** Pregnant individual, law enforcement officer, firefighter, emergency medical care provider, railroad special officer, traffic accident investigation officer, nonsworn law enforcement agency employee who is certified as an agency inspector, blood alcohol analyst, breath test operator, law enforcement explorer, traffic infraction enforcement officer, parking enforcement specialist, security officer, staff member

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188. COLO. REV. STAT. §§ 18-3-202, 18-3-203, 18-3-204, 18-1.3-401, 18-1.3-501 (2016).

189. CONN. GEN. STAT. §§ 53a-59, 53a-59a, 53a-59b, 53a-59c, 53a-60, 53a-60b, 53a-60c, 53a-61a (2015 & Supp. 2016).

190. DEL. CODE ANN. tit. 11, §§ 601, 605, 606, 612, 613, 614, 1103A, 1105 (2016).

191. D.C. CODE §§ 22-404.02, 22-404.03, 22-405, 22-933, 22-851, 22-3602, 22-3751, 22-3751.01, 22-3601, 22-3611 (2016).

of a sexually violent predators detention or commitment facility, juvenile probation officer, staff member of a detention or commitment facility, person who provides health services, employee of correctional facility, person sixty-five years of age or older, school district employee or elected official, private school employee, Florida School for the Deaf and the Blind employee, university lab school employee, state university employee, employee of an entity of the state system of public education, sports official, employee or protective investigator of the Department of Children and Family Services, employee of a lead community-based provider and its direct service contract providers, employee of the Department of Health or its direct service contract providers, visitor to a detention facility, detainee in a detention facility, code inspector, child.<sup>192</sup>

**Georgia:** Employee of a public school system, female who is pregnant, peace officer, person who is sixty-five years of age or older, correctional officer, student, teacher, school personnel, child under the age of fourteen years, officer of a court (judge, attorney, clerk of court, deputy clerk of court, court reporter, court interpreter, or probation officer), police officer, correction officer, detention officer, sports official (person who officiates, umpires, or referees an amateur contest at the collegiate, elementary or secondary school, or recreational level), person who is admitted to or receiving services from a long-term care or assisted living facility, child under the age of eighteen.<sup>193</sup>

**Guam:** Peace officer, incompetent person.<sup>194</sup>

**Hawaii:** Correctional worker, educational worker, emergency medical services provider, person employed at a state-operated or -contracted mental health facility, firefighter, water safety officer, law enforcement officer, emergency worker.<sup>195</sup>

**Idaho:** Pregnant individual, justice, judge, magistrate, prosecuting attorney, public defender, peace officer, bailiff, marshal, sheriff, police officer, peace officer standards and training employee involved in peace officer decertification activities, emergency services dispatcher, correctional officer, employee of the department of correction, employee of a private prison contractor while employed at a private correctional facility in the State of Idaho, employee of the department of water resources, jailer, parole officer, misdemeanor probation officer, officer of the Idaho state police, fireman, social caseworkers or social work specialists of the department of health and welfare, employee of a state secure confinement facility for juveniles, employee of a juvenile

192. FLA. STAT. §§ 784.045, 784.07, 784.071, 784.074, 784.075, 784.076, 784.078, 784.08, 784.081, 784.082, 784.083, 784.085 (West 2016).

193. GA. CODE ANN. §§ 16-5-20, 16-5-21, 16-5-23, 16-5-23.1, 16-5-24, 16-5-70 (2016).

194. 9 GUAM CODE ANN. §§ 19.30, 31.40 (2015).

195. HAW. REV. STAT. §§ 707-711, 707-712.5, 707-712.6, 707-712.7 (2016).

detention facility, teacher at a detention facility or a juvenile probation officer, licensed emergency medical services personnel, member or employee or agent of the state tax commission, United States marshal, federally commissioned law enforcement officer or deputy or agent, peace officer, sheriff, detention officer, correctional officer, staff member or private contractor or employee of a county or state correctional facility, authorized visitor to a county or state correctional facility or work release center or labor camp, public school teacher, student, vulnerable adult.<sup>196</sup>

**Illinois:** Physically handicapped person, person sixty years of age or older, teacher, school employee, park district employee, peace officer, community policing volunteer, fireman, private security officer, emergency management worker, emergency medical technician, utility worker, correctional officer, probation officer, correctional institution employee, county juvenile detention center employee, Department of Human Services employee, Department of Human Services officer, employee or subcontractor of the Department of Human Services supervising or controlling sexually dangerous persons or sexually violent persons, officer or employee of the State of Illinois, transit employee, transit passenger, sports official, coach, person authorized to serve process, special process server, employee of a police department, employee of a sheriff's department, traffic control municipal employee, child, intellectually disabled person, child under the age of thirteen years, severely or profoundly intellectually disabled person, pregnant person, judge, taxi driver, merchant, student.<sup>197</sup>

**Indiana:** Law enforcement officer, person summoned and directed by a law enforcement officer, employee of a penal facility, employee of a juvenile detention facility, firefighter, person less than fourteen years of age, person who has a mental or physical disability, endangered adult, employee of the department of correction, department of child services employee, pregnant woman, emergency medical services provider.<sup>198</sup>

**Iowa:** Peace officer, jailer, correctional staff, member or employee of the board of parole, health care provider, employee of the department of human services, employee of the department of revenue, fire fighter, employee of a jail or institution or facility under the control of the department of corrections, student (hazing).<sup>199</sup>

**Kansas:** Law enforcement officer, school employee, mental health employee, dependent adult, child under the age of eighteen years.<sup>200</sup>

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196. IDAHO CODE §§ 18-904, 18-907, 18-915, 18-915B, 18-916, 18-917, 18-917A, 18-1505 (2016).

197. 720 ILL. COMP. STAT. 5/12-2, 5/12-3.05 (2016).

198. IND. CODE § 35-42-2-1 (2016).

199. IOWA CODE §§ 708.3A, 708.3B, 708.10 (2017).

200. KAN. STAT. ANN. §§ 21-5412, 21-5413, 21-5417, 21-5602 (2016).

**Kentucky:** Peace officer (state, county, city, or federal), employee of a detention facility, employee of a state residential treatment facility, employee of a state staff secure facility for residential treatment, employee of the Department for Community Based Services, paid or volunteer emergency medical services personnel, paid or volunteer member of an organized fire department, paid or volunteer rescue squad personnel, probation and parole officer, transportation officer, employee or volunteer of a public or private elementary or secondary school or school district, school bus driver, person twelve years of age or less, person who is physically helpless, person who is mentally helpless.<sup>201</sup>

**Louisiana:** Active member of the United States Armed Forces, disabled veteran, police officer, school teacher, school or recreation athletic contest official, correctional facility employee, bus operator, child welfare worker, adult protective service worker, infirm person, disabled person, person aged sixty years or older, employee of a store or merchant, peace officer, utility service employee.<sup>202</sup>

**Maine:** Person who is less than six years of age, pregnant person.<sup>203</sup>

**Maryland:** Law enforcement officer, parole or probation agent, employee or inmate of a state correctional facility, employee or inmate of a local correctional facility, employee or inmate of a sheriff's office, student (hazing).<sup>204</sup>

**Massachusetts:** Person who is pregnant, public employee, firefighter, person with an intellectual disability, emergency medical technician, ambulance operator, ambulance attendant, health care provider, child, elder person sixty years of age or older, person with a disability.<sup>205</sup>

**Michigan:** Employee of the family independence agency, police officer, conservation officer, sheriff, deputy sheriff, constable, peace officer, firefighter, emergency medical service personnel, individual engaged in a search and rescue operation, employee or contractor of a public utility, pregnant individual.<sup>206</sup>

**Minnesota:** Peace officer, correctional employee, minor, person under the age of four, member of municipal or volunteer fire department, emergency medical services personnel, physician or nurse or person providing health care services in a hospital emergency department, employee of the Department of Natural Resources, probation officer or other qualified person employed in supervising offenders, employee or

201. KY. REV. STAT. ANN. §§ 508.025, 508.100, 508.110, 508.120 (West 2016).

202. LA. STAT. ANN. §§ 14:34, 14:34.1, 14:34.2, 14:34.3, 14:34.4, 14:34.5, 14:34.5.1, 14:34.7, 14:35.1, 14:35.2, 14:37, 14:37.2, 14:37.3, 14:37.5, 14:37.6, 14:38.2, 14:38.3 (2016).

203. ME. REV. STAT. tit. 17-A, §§ 207, 208-C (2016).

204. MD. CODE ANN., CRIM. LAW §§ 3-203, 3-205, 3-210, 3-607 (West 2016).

205. MASS. GEN. LAWS ch. 265 §§ 13A, 13D, 13D1/2, 13F, 13I, 13J, 13K, 15A, 15B (2016).

206. MICH. COMP. LAWS §§ 750.81c, 750.81d, 750.81e, 750.90a, 750.90b (2016).

other individual who provides care or treatment at a secure treatment facility, school official, agricultural inspector, occupational safety and health investigator, child protection worker, public health nurse, animal control officer, parole officer, community crime prevention group member, vulnerable adult, reserve officer, employee or contractor of a utility, transit operator.<sup>207</sup>

**Mississippi:** Statewide elected official, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker or family protection specialist or family protection worker employed by the Department of Human Services or another agency, Division of Youth Services personnel, county or municipal jail officer, superintendent or principal or teacher or other instructional personnel, school attendance officer, school bus driver, judge of a circuit, chancery, county, justice, municipal or youth court, judge of the Court of Appeals, justice of the Supreme Court, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, public defender, utility worker, pregnant woman, female of previous chaste character.<sup>208</sup>

**Missouri:** Incapacitated person, law enforcement officer, corrections officer, emergency personnel, highway worker in a construction or work zone, utility worker, cable worker, probation officer, parole officer, visitor in a correctional facility, prisoner in a correctional facility, mental health employee, visitor or other person at a secure facility, person who is seventeen years of age or younger, employee of any law enforcement agency, person sixty years of age or older, vulnerable person, child who is less than eighteen years of age, child who is less than fourteen years of age.<sup>209</sup>

**Montana:** Peace officer, judicial officer, sports official, minor under fourteen years of age, minor under thirty-six months of age, law enforcement officer, staff person of a correctional or detention facility, health care provider, emergency responder.<sup>210</sup>

**Nebraska:** Vulnerable adult.<sup>211</sup>

**Nevada:** Peace officer, person employed in a full-time salaried occupation of firefighting, member of a volunteer fire department, jailer or guard or matron or other correctional officer of a city or county jail, justice of the Supreme Court, district judge, justice of the peace, municipal

207. MINN. STAT. §§ 609.221, 609.223, 609.2231, 609.2335 (2016).

208. MISS. CODE ANN. §§ 97-3-7, 97-3-37, 97-3-71 (2016).

209. MO. REV. STAT. §§ 565.070, 565.081, 565.082, 565.083, 565.085, 565.086, 565.090, 565.092, 565.180, 565.182, 565.184, 565.210, 565.212, 565.214, 568.060 (2016).

210. MONT. CODE ANN. §§ 45-5-212, 45-5-214, 45-5-210, 45-5-211 (2015).

211. NEB. REV. STAT. § 28-386 (2016).

judge, magistrate, court commissioner or master or referee, employee of the state whose official duties require the employee to make home visits, provider of health care, school employee, sports official, taxicab driver, transit operator, person less than eighteen years of age, person less than fourteen years of age, older person, vulnerable person.<sup>212</sup>

**New Hampshire:** Person under thirteen years of age, law enforcement officer, sitting member of a general court or immediate family member, executive councilor or immediate family member, past or present governor or immediate family member, member of the judiciary or immediate family member, marital master or immediate family member, elderly adult, disabled adult, impaired adult.<sup>213</sup>

**New Jersey:** Law enforcement officer, paid or volunteer fireman, person engaged in emergency first-aid or medical services, school board member, school administrator, teacher, school bus driver, employee of a school or school board, employee of the Division of Child Protection and Permanency, justice of the Supreme Court, judge of the Superior Court, judge of the Tax Court, municipal judge, operator of a motorbus or the operator's supervisor, employee of a rail passenger service, Department of Corrections employee, county corrections officer, juvenile corrections officer, state juvenile facility employee, juvenile detention staff member, juvenile detention officer, probation officer, sheriff, undersheriff, sheriff's officer, employee or contractor of a utility company, health care worker, direct care worker at a state or county psychiatric hospital or state developmental center, or veterans' memorial home, emergency services personnel involved in fire suppression activities, person who is unable to care for himself because of mental disease or defect.<sup>214</sup>

**New Mexico:** Pregnant woman, school employee, sports official, health care worker.<sup>215</sup>

**New York:** Peace officer, police officer, prosecutor, registered nurse, licensed practical nurse, sanitation enforcement agent, New York city sanitation worker, firefighter, emergency medical service paramedic, emergency medical service technician, medical or related personnel in a hospital emergency department, city marshal, school crossing guard, traffic enforcement officer, traffic enforcement agent, employee of a local social services district directly involved in investigation or response to alleged abuse or neglect of a child or vulnerable elderly person or an incompetent or physically disabled person, child under the age of eighteen, person less than eleven years old, person less than seven

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212. NEV. REV. STAT. §§ 200.471, 200.481, 200.508, 200.5099 (2015).

213. N.H. REV. STAT. ANN. §§ 631:1, 631:2, 631:3-a, 631:4-a, 631:8 (2016).

214. N.J. STAT. ANN. §§ 2C:12-1, 2C:12-13, 2C:24-7 (West 2016).

215. N.M. STAT. ANN. §§ 30-3-7, 30-3-9.1, 30-3-9.2, 30-3-9 (2016).

years old, employee of a school or public school district, student of a school or public school district, train operator, ticket inspector, conductor, signal person, bus operator, station agent, person who is sixty-five years of age or older, judge.<sup>216</sup>

**North Carolina:** Handicapped person (person with a physical or mental disability or an infirmity), patient of a health care facility, resident of a residential care facility, sports official, female, child under the age of twelve years, officer or employee of the state or any political subdivisions of the state, school employee, school volunteer, public transit operator, company police officer, campus police officer, law enforcement officer, probation officer, parole officer, employee of a state or local detention facility, emergency medical technician, emergency health care provider, medical responder, emergency department personnel, firefighter.<sup>217</sup>

**North Dakota:** Peace officer, correction institution employee, employee of the state hospital, person engaged in a judicial proceeding, member of a municipal or volunteer fire department, member of an emergency medical services personnel unit, emergency department worker, person under the age of twelve years, law enforcement support animal, person lawfully present in a correctional facility or penitentiary who is not an inmate, person who is transporting an individual who is lawfully detained.<sup>218</sup>

**Ohio:** Peace officer, investigator of the bureau of criminal identification and investigation, employee of the department of rehabilitation and correction, employee of the department of youth services, employee of a local correctional facility, employee of a probation department, person on the grounds of a local correctional facility for business purposes or as a visitor, school teacher, school administrator, school bus operator, firefighter, person performing emergency medical service, officer or employee of a public children services agency or a private child placing agency, health care professional of a hospital, health care worker of a hospital, security officer of a hospital, judge, magistrate, prosecutor, court official, court employee.<sup>219</sup>

**Oklahoma:** Aged person, decrepit person, incapacitated person, police officer, sheriff, deputy sheriff, highway patrolman, corrections personnel, state peace officer, police dog, police horse, service animal that is used for the benefit of a handicapped person, referee, umpire, timekeeper, coach, sports official, person having authority in connection with any amateur or professional athletic contest, Department of Cor-

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216. N.Y. PENAL LAW §§ 120.05, 120.08, 120.09, 120.11, 120.12 (McKinney 2016).

217. N.C. GEN. STAT. §§ 14-32.1, 14-32.2, 14-33, 14-34.2, 14-34.5, 14-34.6, 14-34.7 (2016).

218. N.D. CENT. CODE §§ 12.1-17-01, 12.1-17-01.1, 12.1-17-02, 12.1-17-09, 12.1-17-11 (2016).

219. OHIO REV. CODE ANN. §§ 2903.11, 2903.12, 2903.13 (West 2015-2016).



rections employee, person contracting with the Department of Corrections to provide services, Office of Juvenile Affairs employee, employee of any residential facility, emergency medical technician, emergency medical care provider, officer of a state district or appellate court, officer of the Workers' Compensation Court, school employee, student, employee of a facility maintained by a private contractor pursuant to a contract with the Office of Juvenile Affairs, employee of the state or a county or a city, employee of a contractor of the state or a county or a city, vulnerable adult, child, child under twelve.<sup>220</sup>

**Oregon:** Pregnant individual, operator of a public transit vehicle, staff member of a youth correction facility, emergency medical services provider, child ten years of age or younger, operator of a taxi, child under six years of age, peace officer, corrections officer, youth correction officer, parole and probation officer, animal control officer, firefighter or staff member.<sup>221</sup>

**Pennsylvania:** Law enforcement officer, officer or employee of a correctional institution or county jail or prison or detention facility or mental hospital, child under twelve years of age, teaching staff member, school board member or employee, police officer, firefighter, county adult probation or parole officer, county juvenile probation or parole officer, agent of the Pennsylvania Board of Probation and Parole, sheriff, deputy sheriff, liquor control enforcement agent, judge of any court in the unified judicial system, Attorney General, deputy attorney general, district attorney, assistant district attorney, public defender, assistant public defender, federal law enforcement official, state law enforcement official, local law enforcement official, person employed to assist or who assists any federal or state or local law enforcement official, emergency medical services personnel, parking enforcement officer, magisterial district judge, constable, deputy constable, psychiatric aide, Governor, Lieutenant Governor, Auditor General, State Treasurer, Member of the General Assembly, employee of the Department of Environmental Protection, individual engaged in the private detective business, employee or agent of a county children and youth social service agency or of the legal representative of such agency, public utility employee, employee of an electric cooperative, wildlife conservation officer or deputy wildlife conservation officer of the Pennsylvania Game Commission, waterways conservation officer or deputy waterways conservation officer of the Pennsylvania Fish and Boat Commission, sports official.<sup>222</sup>

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220. OKLA. STAT. tit. 21, §§ 649, 646, 649.1, 649.2, 649.3, 650, 650.1-9, 650.2, 650.3, 650.4, 650.5, 650.6, 650.7, 650.8, 650.9, 843.3, 843.5 (2016).

221. OR. REV. STAT. §§ 163.160, 163.165, 163.185, 163.208 (2015).

222. 18 PA. CONS. STAT. §§ 2701, 2702, 2702.1, 2712 (2016).

**Rhode Island:** Uniformed member of the state police or metropolitan park police, environmental police officer, state properties patrol officer, probation officer, parole officer, state government case worker or investigator, judge of the supreme or superior or family or district court or the traffic tribunal or municipal court, deputy sheriff, city or town police officer, city or town firefighter, member of the capitol police, member of campus security force of a state college or university, member of the Rhode Island airport police department, member of the Rhode Island fugitive task force, Rhode Island public transit authority bus driver, on-duty plainclothes member of a town or city or state police force, investigator of the department of the attorney general, member of the railroad police, uniformed dog officer, out-of-state police officer called into Rhode Island under a cooperative agreement to provide mutual aid at the request of the State of Rhode Island, assistant attorney general, special assistant attorney general, employee of the department of environmental management responsible for administrative inspections, constable, schoolteacher, student teacher, school security officer, school administrator, uniformed member of the correctional officer staff at an adult correctional institution, training school employee at the training school for youth, correctional officer, employee of the department of corrections, person sixty years of age or older, person with severe impairments, child ten years of age or younger, health care provider, emergency medical services personnel.<sup>223</sup>

**South Carolina:** Law enforcement officer.<sup>224</sup>

**South Dakota:** Law enforcement officer, Department of Corrections employee, person under contract assigned to the Department of Corrections, public officer, infant less than three years old, Department of Corrections visitor, person authorized by the Department of Corrections to be on the premises, county or municipal jail employee or visitor or other person authorized to be on the premises, juvenile detention or juvenile facility employee or visitor or other person authorized to be on the premises.<sup>225</sup>

**Tennessee:** Law enforcement officer, health care provider, public employee, employee of a transportation system, firefighter, medical fire responder, paramedic, emergency medical technician, first responder, child under eighteen years of age, child under eight years of age.<sup>226</sup>

**Texas:** Public servant, security officer, emergency services personnel, elderly individual sixty-five years of age or older, disabled individual,

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223. 11 R.I. GEN. LAWS §§ 11-5-5, 11-5-7, 11-5-8, 11-5-8.1, 11-5-10, 11-5-10.1, 11-5-10.2, 11-5-11, 11-5-14.2, 11-5-15, 11-5-16 (2016).

224. S.C. CODE ANN. § 16-9-320 (2016).

225. S.D. CODIFIED LAWS §§ 22-18-1.4, 22-18-1.05, 22-18-26, 22-18-29, 22-18-29.1 (2016).

226. TENN. CODE ANN. §§ 39-13-101, 39-13-102, 39-15-401 (2016).

sports participant, witness, prospective witness, informant, person who has reported the occurrence of a crime, child fourteen years of age or younger.<sup>227</sup>

**Utah:** Pregnant individual, employee of a public or private school, peace officer, military servicemember in uniform, correctional officer, health care provider, emergency medical service worker, child under eighteen years of age, vulnerable adult (an elder adult sixty-five years of age or older or an adult who has a mental or physical impairment which substantially affects the person's ability to engage in certain activities).<sup>228</sup>

**Vermont:** Law enforcement officer, firefighter, health care worker, member of emergency medical personnel, employee of the department of corrections, person lawfully present in a correctional facility, child, vulnerable adult.<sup>229</sup>

**Virgin Islands:** Peace officer, officer, aged person, decrepit person, female, child, teacher or person employed in any school, caseworker or investigator or person employed by the Department of Health or Human Services or any agency.<sup>230</sup>

**Virginia:** Law enforcement officer, firefighter, search and rescue personnel, emergency medical services personnel, pregnant woman, employee of a state or local or regional correctional facility, person lawfully admitted to a state or local or regional correctional facility, person who is supervising or working with prisoners or persons held in legal custody, probation officer, parole officer, local pretrial services officer, judge, magistrate, person involved in the care or treatment or supervision of inmates in the custody of the Department of Corrections, person involved in the care or treatment or supervision of inmates in the custody of or under the supervision of the Department of Juvenile Justice, employee or other individual who provides control or care or treatment of sexually violent predators committed to the custody of the Department of Behavioral Health and Developmental Services, full-time or part-time employee of any public or private elementary or secondary school, guidance counselor, health care provider.<sup>231</sup>

**Washington:** Person employed as a transit operator or driver, immediate supervisor of a transit operator or driver, mechanic of a transit company or service provider, security officer of a transit company or service provider, school bus driver, immediate supervisor of a school bus driver, mechanic employed by a school district transportation ser-

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227. TEX. PENAL CODE ANN. §§ 22.01, 22.02, 22.04, 22.11 (West 2016).

228. UTAH CODE ANN. §§ 76-5-102, 76-5-102.4, 76-5-102.6, 76-5-102.7, 76-5-109, 76-5-102.3, 76-5-111 (West 2016).

229. VT. STAT. ANN. tit. 13, §§ 1024, 1028, 1028a, 1304, 1376 (2016).

230. V.I. CODE ANN. tit. 14, §§ 297, 298 (2016).

231. VA. CODE ANN. §§ 18.2-51.1, 18.2-55, 18.2-57, 18.2-57.01, 18.2-51.2 (2016).

vice, security officer employed by a school district transportation service, firefighter, employee of a fire department, employee of a county fire marshal's office, employee of a county fire prevention bureau, employee of a fire protection district, law enforcement officer, employee of a law enforcement agency, peace officer, nurse, physician, health care provider, judicial officer, court-related employee, county clerk, county clerk's employee, person located in a courtroom or jury room or judge's chamber or any waiting area or corridor immediately adjacent to a courtroom or jury room or judge's chamber, full or part-time staff member or volunteer or educational personnel or personal service provider or vendor or agent at a juvenile corrections institution or local juvenile detention facility, full or part-time staff member or volunteer or educational personnel or personal service provider or vendor or agent at an adult corrections institution or local adult detention facility, full or part-time community correction officer, full or part-time employee of a community corrections office, volunteer who is assisting a community correction officer or employee, child under the age of thirteen.<sup>232</sup>

**West Virginia:** Child sixteen years of age or under, person who is sixty-five years of age or older, government representative, health care worker, utility worker, emergency service personnel, law enforcement officer, school employee, athletic official, driver or conductor or motorman or captain or other person in charge of any vehicle or boat.<sup>233</sup>

**Wisconsin:** Person sixty-two years of age or older, person with a physical disability, officer or employee or visitor or inmate of a state prison or a state or county or municipal detention facility, officer or employee or agent or visitor or resident of a facility for the care of sexually violent persons, fire fighter, commission warden, probation or extended supervision or parole agent, after-care agent, grand juror, petit juror, public officer, technical college district or school district officer or employee, operator or driver of a public transit vehicle, passenger of a public transit vehicle, emergency department worker, emergency medical technician, first responder, ambulance driver, witness, family member or person sharing a domicile with a witness, judge, family member of a judge, prosecutor, family member of a prosecutor, law enforcement officer, family of a law enforcement officer, department of revenue official or employee or agent, family member of a department of revenue official or employee or agent, department of safety and professional services official or employee or agent, family member of a department of safety and professional services official or employee or agent, department of workforce development official or employee or

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232. WASH. REV. CODE §§ 9A.36.031, 9A.36.120, 9A.36.130, 9A.36.140, 9A.36.100 (2016).

233. W. VA. CODE §§ 61-2-10a, 61-2-10b, 61-2-15a, 61-2-16a, 61-2-15, 61-2-9b (2016).

agent, family member of a department of workforce development official or employee or agent, employee of a county or city or village or town inspecting or enforcing an ordinance or code or other construction rule, individual at risk, child.<sup>234</sup>

**Wyoming:** Pregnant woman, child under the age of sixteen years, child under the age of eighteen years, vulnerable adult (adult who is unable to manage and take care of himself or his money or assets or property without assistance as a result of advanced age or physical or mental disability), corrections officer, detention officer, department of corrections staff member or volunteer.<sup>235</sup>

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234. WIS. STAT. §§ 940.19, 948.03, 940.20, 940.203, 940.201, 940.205, 940.207, 940.208, 940.285 (2015-2016).

235. WYO. STAT. ANN. §§ 6-2-502, 6-2-503, 6-2-507, 6-2-508 (2016).